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Twenty-fifth session
Agenda item 1
Organizational and procedural matters

Information provided by the National Human Rights Council of the Kingdom of Morocco*

Note by the Secretariat

The Secretariat of the Human Rights Council hereby transmits the communication submitted by the National Human Rights Council of the Kingdom of Morocco,** reproduced below in accordance with rule 7 (b) of the rules of procedure described in the annex to Council resolution 5/1, according to which the participation of national human rights institutions is to be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005.

* National human rights institution with "A" -status accreditation from the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

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Annexe

[Français seulement]

Conseil National des Droits de L'Homme du Royaume du Maroc, Institution Nationale de Promotion et de Protection des Droits de l'Homme

Point 1 de l'ordre du jour

Haut Panel sur la transversalisation des Droits de l'Homme

Le Conseil national des droits de l'Homme du Royaume du Maroc (ci-après le CNDH) a l'honneur de participer par la présente au Panel de haut niveau sur la transversalisation des droits de l'Homme (*human rights mainstreaming*).

Le CNDH est une institution nationale de promotion et de protection des droits de l'Homme dont les prérogatives et les attributions ont été élargies aussi bien au niveau national que régional suite à sa restructuration en mars 2011. Doté du statut A par le Comité international de coordination des institutions nationales des droits de l'Homme (CIC), le CNDH est devenu une institution de gouvernance reconnue par la Constitution marocaine de juillet 2011.

En vertu de sa loi fondatrice, le CNDH est invité à interagir avec les différents mécanismes et agences onusiens de protection des droits de l'Homme et à coopérer avec les différents réseaux des INDH ainsi qu'avec d'autres organisations internationales afin de renforcer le rôle du Maroc dans ce domaine.

La présente contribution vise à dresser un état des lieux sur la mise en œuvre des recommandations émises dans le rapport thématique du CNDH sur «Les étrangers et les droits de l'Homme au Maroc[1]». Ce rapport prône une nouvelle politique d'asile et d'immigration au Maroc, garantissant les droits des migrants et des réfugiés basée sur une méthode participative et inclusive de toutes les parties prenantes.

Depuis la publication des recommandations de ce rapport, une série de mesures et d'actions ont été prises par les différents acteurs concernés. Il convient d'en souligner les plus importantes:

- Le 9 septembre 2013, un communiqué du cabinet royal a exhorté la prise en compte des recommandations du CNDH et a invité à l'adoption d'une approche globale et humaniste, conformément au droit international et dans le cadre d'une coopération multilatérale rénovée;
- Le 10 septembre 2013, Sa Majesté le Roi a présidé une réunion en présence du chef du gouvernement marocain et d'une délégation ministérielle, au cours de laquelle il a appelé à l'adoption d'une nouvelle politique migratoire en coordination avec le CNDH;
- Le 12 septembre 2013, quatre commissions chargées de la mise en œuvre des recommandations du CNDH ont été créées:

[1] http://www.cndh.org.ma/sites/default/files/documents/Conclusions_et_recommandations_version_fr-2.pdf.

- une commission chargée de la réforme et la mise en place d'un arsenal juridique relatif à la migration, l'asile et la lutte contre la traite des personnes;
- une commission chargée de la régularisation de la situation administrative de certaines catégories de migrants en situation irrégulière;
- une commission chargée d'étudier les demandes d'asile formulées par le Bureau du Haut-Commissariat des Nations Unies pour les réfugiés;
- une commission diplomatique.

- Le 25 septembre 2013, un bureau des réfugiés et apatrides, affilié au ministère des Affaires étrangères a été ouvert;
- Le 9 octobre 2013, le ministère de l'Éducation nationale a publié une circulaire facilitant l'accès à l'éducation des enfants migrants, indépendamment de leur statut;
- Le 06 Novembre 2013, le discours de Sa Majesté le Roi à l'occasion du 38ème anniversaire de la Marche Verte, a réitéré l'engagement du Maroc à élaborer une nouvelle politique globale relative aux questions d'immigration et d'asile, conforme aux engagements internationaux et respectueuse des droits des immigrés, comme il a fait référence à l'initiative de l'Alliance africaine pour la migration et le développement présentée par le Maroc. Cette initiative est axée sur une vision africaine commune des principes humanitaires devant présider aux questions migratoires et s'appuie sur la responsabilité partagée entre les pays d'origine, de transit et d'accueil, et sur le lien étroit entre migration et développement;
- Le 11 Novembre 2013, il a été procédé au lancement de l'opération d'identification des catégories de migrants en situation administrative irrégulière devant bénéficier de l'opération de régularisation exceptionnelle et dont les conditions sont les suivantes:
  - Les étrangers conjoints de ressortissants marocains justifiant d'au moins 2 ans de vie commune;
  - Les étrangers conjoints d'autres étrangers en résidence régulière au Maroc et justifiant d'au moins 4 ans de vie commune;
  - Les enfants issus des deux cas susvisés;
  - Les étrangers disposant de contrats de travail effectifs d'au moins 2 ans;
  - Les étrangers justifiant de 5 ans de résidence continue au Maroc;
  - Les étrangers atteints de maladies graves et se trouvant sur le territoire national avant le 31 décembre 2013.
- Le 11 Novembre 2013, il a été procédé à l'établissement d'une procédure et d'un calendrier de régularisation (1er Janvier 2014 au 31 Décembre 2014);
- Le 14 Novembre 2013, tenue à Rabat de la première journée d'information au profit de la société civile œuvrant sur la question de l'immigration;
- Au 21 Novembre 2013, le Haut-Commissariat des Nations unies pour les réfugiés a traité 532 dossiers sur 853 dossiers reçus et a accordé le statut de réfugiés pour 524 dossiers;
- Le 4 décembre 2013, l'association dénommée «Groupe antiraciste d'accompagnement et de défense des étrangers et des migrants» (GADEM) accède au statut d'association autorisée;

- Le 17 décembre 2013, livraison du premier lot de cartes des réfugiés au profit de 853 cas reconnus par le Haut-Commissariat des nations unies pour les Réfugiés;
- Le 18 Décembre 2013, lancement de l'opération de demande de la carte de séjour pour les réfugiés;
- Le 24 Décembre 2013, octroi des premières cartes de séjour pour les réfugiés;
- Le 2 janvier 2014, lancement officiel de la compagne de régularisation des immigrés;
- Le 23 janvier 2014, organisation de la deuxième journée d'information et de concertation avec la société civile;
- Le 14 février 2014, remise des premières cartes de séjour aux bénéficiaires de l'opération de régularisation.

Tout en saluant les efforts déployés et les progrès indéniables enregistrés dans la mise en œuvre de ses recommandations, le CNDH exprime sa satisfaction quant à la diligence avec laquelle le gouvernement a mis en mouvement le processus de mise en œuvre des recommandations.

Les recommandations constituent, certes, une première étape, de la plus haute importance. Leur mise en œuvre et traduction en mesures gouvernementales concrètes devant conduire à un renforcement du respect des droits fondamentaux et des droits humains des migrants.

Même s'il estime que toutes les conditions semblent aujourd'hui réunies pour mettre en œuvre cette nouvelle politique migratoire, le CNDH reste conscient que les mesures adoptées jusque-là ne peuvent à elles seules améliorer la situation des droits des immigrés au Maroc.

Conformément à son statut et à ses compétences, le CNDH assurera le suivi de la mise en œuvre de ses recommandations. Il veillera à ce que les textes d'application et les dispositions soient conformes aux engagements du Maroc dans ce domaine.

Il s'engage en tant qu'observateur actif dans l'opération de régularisation, et assurera sa fonction de coordinateur de la commission des recours une fois créée.

D'autre part, le CNDH a instauré auprès des commissions régionales des droits de l'Homme (CRDH) un cadre global permettant de faire le suivi de la gestion des migrations d'une façon cohérente et bénéfique au moyen d'un dialogue permanent et d'une coopération étroite et concrète avec les autres parties prenantes. Il présentera un rapport sur le déroulement de l'opération de régularisation à la fin de l'opération.

Conscient que le suivi de l'opération de régularisation efficiente exige des compétences, le CNDH s'engage à accompagner le tissu associatif marocain actif dans les zones des 83 commissions instaurées sur le territoire national, pour lui permettre de mieux assumer sa fonction de médiation et de défense des droits des migrants.

Le CNDH estime nécessaire de mobiliser des moyens humains et financiers pour le renforcement des capacités du tissu associatif, afin notamment, de mieux s'acquitter des tâches d'accueil, d'orientation et d'accompagnement des immigrés dans leurs démarches administratives. Il appelle les acteurs associatifs à accorder davantage d'importance à la question migratoire.

Le CNDH exhorte le gouvernement et le Parlement à accélérer la révision des textes législatifs et réglementaires conformément à ses recommandations et la ratification des Conventions n° 97 et 143 de l'OIT sur les travailleurs migrants de manière à instaurer un cadre juridique cohérent et garantissant les droits des migrants.

Par ailleurs, l'intégration des immigrés constitue un défi important à relever. Il convient de mettre en place une structure de suivi, de veille stratégique et d'intelligence sociale en direction des immigrés et de la société marocaine dans sa globalité. Elle permettrait plus de souplesse, plus de flexibilité, plus de rapidité et plus de réactivité pour faire face aux défis éventuels.

Le CNDH met l'accent sur la nécessité pour le gouvernement marocain de renforcer sa politique d'immigration en créant une agence nationale dédiée à l'intégration. Il devrait instaurer un cadre global permettant de gérer les migrations d'une façon cohérente, afin de faciliter le suivi de ce dossier pour intégrer efficacement les immigrés.

Enfin, le CNDH appelle à une implication active des partenaires européens pour un partenariat rénové, notamment face aux urgences humanitaires comme c'est le cas concernant la protection temporaire des Syriens et la mise en œuvre et le développement d'une politique d'insertion.

Dans la cadre de l'agenda post 2015, le CNDH réitère son appel à la communauté internationale en ce qui concerne l'intégration de la dimension migratoire dans le développement.

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Annex

[English only]

Information presented by the National Human Rights Council of Morocco to the high-level panel on human rights mainstreaming under the theme of protection and promotion of the human rights of migrants

Foreigners and Human Rights in Morocco for a radically new asylum and migration policy

The Eleventh International Conference of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights took place in Amman, Jordan from 5-7 November 2012 and was hosted by the Jordan National Centre for Human Rights (JNCHR), in cooperation with the Office of the High Commissioner for Human Rights (OHCHR) and the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). The focus of the Conference was "The human rights of women and girls: Promoting gender equality: The role of national human rights institutions."

In a joint paper published in July 2013, the National Human Rights Council (CNDH), the Délégation interministérielle aux droits de l'Homme (DIDH) and the Rabat Office of the International Organization for Migration painted a reality of migration that remains true today. With 240 million international migrants worldwide in 2012 (and 740 million internal migrants), migration constitutes nowadays, almost everywhere in the world, a subject of concern and constant debate, and even controversy, of much concern to governments, civil societies, researchers and international human rights organizations. Polemical approaches persist and are reinforced even as the 2009 report of the United Nations Development Programme (UNDP) has emphasized the central role that population mobility plays in human development.

The affected populations are unevenly distributed: South-North movements account for 97 million migrants, South-South for 74 million, North-North for 37 million, North-South for 40 million, "and the remaining being made up of east-west migrations and, more rarely, west-east" (De Wenden, 2013).

These figures reveal first and foremost the globalization of migration, which has been taking place for two to three decades; to such an extent that today more and more countries, regardless of their level of development, are simultaneously countries of emigration, transit, and immigration. Second, these figures also reflect the emergence of complex regional and sub-regional migratory systems, transnational networks of diaspora, and sophisticated networks dedicated to human trafficking.

The feminization of migration, the extension of migratory routes, the diversification of migrants' and refugees' profiles, and the rise in their socio-cultural level are also salient features of this second wave of contemporary migration, which began in 1980.

However if human migrations constitute in the long run a factor of financial gain for the sending and receiving societies, a stimulus to economic activity, and a source of cultural development, they still remain an issue of concern, increasingly exploited during national elections, leading to the introduction of drastic legal measures in order to control migrants' entries to national territories and the residency of settled populations.

On the international level, especially since the United Nations launched its high-level dialogue on migration, the subject of renewed international governance of human mobility is regularly raised. In this regard, both within national borders and internationally, the issue of human rights has become unavoidable. It is the only measure guaranteeing the basic human rights of migrants, regardless of their administrative situation, as well as providing the necessary approach to build long-term migration policy respectful of rights, of a democratic society and fruitful exchange between cultures and civilizations.

In order to understand the developments that have taken place in Morocco in the field of migration and asylum, it is important to consider the long-term history of the country as well as the aforementioned international changes of the last few decades.

Thus, Morocco is both a sending and a receiving country in terms of migration: a land of emigration since the first wave of the First World War and a land of immigration and settlement, even if the collective consciousness has not yet incorporated these facts.

Located in Africa, a continent facing the challenges of development and regularly shaken by political crises and armed conflicts, Morocco cannot remain on the sidelines without paying attention to the consequences of this troubling and likely protracted situation.

Finally, Morocco undoubtedly suffers from the effects of a strict European policy of control of its external borders.

For all these reasons, Morocco has become a land of asylum and long-term settlement for migrants. It welcomes regular immigrant workers, a relatively large number of foreign students, migrants with an irregular status, "in transit" often for years, and finally asylum seekers and refugees. To these migrations, we can add groups who have been settled in Morocco for generations (Algerians or Syrians for example, and various European nationalities) and an increase of migration as illustrated, for example, by the circular migration of an elite of highly qualified professional workers between Europe and Morocco, or by the extended stays of European pensioners, particularly French retirees.

The combination of these diversified forms of migration makes Morocco, gradually and irreversibly, a cosmopolitan country. The regular and irregular emigration of Moroccans and the growing visibility of new populations of emigrants in Moroccan cities (Chinese, Filipino, or even Nepali as some security arrests have revealed) undoubtedly attest to the fact that Morocco is concerned by the globalization of human mobility. It is this complex reality, which constitutes both a challenge and an opportunity, which is eclipsed by the widely publicized but reductionist image of the sub-Saharan wandering in Moroccan streets, driven to rely on public charity, or attacking regularly as part of a crowd, the borders of the two occupied enclaves.

Faced with this historically unprecedented situation, Moroccan public authorities have acted in an ad hoc manner, without a well-conceptualized and comprehensive initiative adapted to the new realities.

In 2003, a law on the entry and residency of foreigners, illegal emigration and immigration was adopted, followed in 2007 by the signing of an agreement with the UNHCR, delegating the review and the granting of asylum applications. Simultaneously, and with the support of the European Union, a policy of control of illegal emigration has been put in place, with real successes as evidenced by the numbers of arrests and the statements of satisfaction from various European countries.

The increased control of borders is accompanied by regular operations targeting identity checks and arrests in various urban centers or in the forests surrounding the occupied enclaves of Sebta and Mellilia, followed by campaigns of expulsion and return to the Algerian or Mauritanian borders. These campaigns have given rise to numerous violations of the rights of migrant's irregular situations (arrests of refugees, violence and

mistreatment, rejections without referral to justice, etc.), these are added to the violence of offenders and human traffickers and the violations suffered by the migrants during their long migration route, sometimes even before their entry into the national territory.

The authorities argue their right to punish illegal entry and sojourn, to combat the trafficking in human beings and to fight the attempts, also illegal, of crossing of international borders and in particular those with the occupied enclaves. They sometimes contend that they are fighting violent groups engaged in illegal activities and trafficking.

Without contesting the right of Moroccan authorities to control the entry and stay of foreigners and their duty to fight against human trafficking, the CNDH believes that public authorities cannot, in the fulfillment of their missions, evade the constitutional provisions in the matter of human rights and rights of foreigners, the international commitments under the ratification of all the instruments of protection of human rights and in particular, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UN Convention against Torture, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families and the 1951 Refugee Convention.

The latest initiative is the June 2013 signing of a joint declaration establishing a mobility partnership between the Kingdom of Morocco and the European Union and its member states.

Based on this collection of elements, the CNDH calls on public authorities, all social actors and state partners of Morocco to take note of these new realities and to act together to develop and implement a genuine public policy that protects human rights, based on international cooperation and integrating civil society. By raising this challenge, Morocco could provide a positive example for many countries of the South faced with similar problems.

The CNDH considers that this policy should integrate at least the following four major components:

Concerning the situation of refugees and asylum seekers, the CNDH invites the Moroccan government to take the following measures:

- To recognize, pending the introduction of a national legislation and institutional plan of asylum, refugee status as issued by UNHCR, and issue a residency document to statutory refugees;
- To establish a policy of integration of said refugees and their families, in terms of housing, health, schooling, training and employment;
- To allow married statutory refugees to proceed legally to family reunification;
- To ensure compliance with the principle of prohibition of expulsion or return (nonrefoulement) as a cornerstone of the right of the refugees, as mentioned in article 33 of the 1951 Geneva Convention by giving potential asylum-seekers the right to fill out, upon their arrival on the Moroccan territory, an asylum application;
- To establish a national legal and institutional framework of asylum, which is based on the principles set out in the preamble of the 2011 Moroccan constitution, and which organizes the status of refugees in Morocco and the conditions for the exercise of the right of asylum recognized in article 30 of the constitution;

- Pending the establishment of this system, to strengthen the partnership with the UNHCR and support its actions mainly by facilitating its access to asylum seekers across the country.

The CNDH is pleased that a few international donors have already expressed their willingness to participate financially in the efforts necessary to integrate refugees after the issuance of residence permits. It invites the government, the office of the UNHCR in Morocco and Moroccan civil society to begin discussions for the development and implementation of this policy of integration. It expresses its availability to contribute.

Concerning foreigners in irregular administrative status

The CNDH believes that it is time for the government to officially consider the development and establishment of an operation of special regularization of some categories of migrants in irregular administrative situations, according to criteria that take into account the duration of stay in Morocco, the right to family co-residence, the conditions for insertion in Moroccan society, the settlement agreements reached by the Kingdom with other state partners. The CNDH further urges the international organizations of the United Nations system, partner countries of Morocco, including European countries and the European Union, to work actively for the success of such operation by mobilizing human and financial resources for the implementation of a genuine policy of inclusion of regularized migrants.

Considering the economic and social constraints that weigh on a country like Morocco, an ambitious international cooperation is vital. The CNDH believes that this dimension should be included as one of the priorities of the recently signed mobility partnership.

Considering the fact that Morocco, like all other countries of the world, will sustainably accommodate groups of irregular migrants, and without questioning the right of authorities to control the entry and residence of foreigners, the CNDH strongly recalls that foreigners themselves are protected by all constitutional guarantees against discrimination, abuse, unfair trials, etc., and have rights affirmed by international law, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the recently adopted General Comment no. 2 of the Committee on Migrant Workers.

In this context, the CNDH invites the Moroccan government to take the following measures:

- To ensure effective access to justice for irregular migrants in the case of arrest, provisionary detention or trial (access to lawyers and interpreters, access to consular authorities, access to asylum procedures, access to care, etc.) ;
- To develop training programs and raise awareness among personnel responsible for dealing with immigrants (police, border police, prison staff, judges, health care staff, etc.);
- To pay particular attention to the material and legal support of unaccompanied foreign minors and of migrant women, in particular, the psychological and medical treatment of victims of violence ;
- To ban all forms of violence against undocumented migrants during arrest procedures;
- To take measures to discourage employers who exploit undocumented migrants, and guarantee access to labor inspectors without fear of retribution; To facilitate the registration of new births and issuing of death certificates.

Welcoming the efforts of members of civil society involved in the defense of the rights of migrants and asylum seekers, the CNDH believes that its active and collaborative involvement is essential to deal with historical changes outlined above. It calls for the establishment of a permanent platform for dialogue between the government and members of the national and international civil society, allowing the exchange of information, the mobilization of humanitarian assistance and legal expertise, the dissemination of good practices, assisted voluntary return, etc.

The integration of migrants' organizations in this process is critical, as is their regularization under the right of association, a situation facing some associations of migrant assistance, such as the GADEM.

Concerning the fight against the trafficking of persons

The CNDH invites the government to introduce in Chapter 7 of Title I of Book III of the Criminal Code provisions against the recruitment, transportation, transfer, harboring or reception of persons, by the use or threat of the use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or by the offer or acceptance of payments or benefits to achieve the consent of a person having authority over another for purposes of exploitation.

In the same vein, the CNDH proposes that the definition of exploitation, at the end of this chapter, should include at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

The CNDH recommends including in the Criminal Code provisions protecting minors especially, considering the commission of a human trafficking offense against a minor as an aggravating circumstance.

In order to ensure effective protection of alleged victims of human trafficking, the CNDH proposes to amend article 82-7 of the Code of Criminal Procedure to ensure the protection of victims, witnesses, experts and whistleblowers with respect to cases involving the trafficking of persons.

Finally, and to facilitate the implementation of the above recommendations, the CNDH proposes that the government be guided by the provisions of the Model Law against Trafficking in Persons developed by the United Nations Office on Drugs and Crime (UNODC) in 2009.

To accompany the proposed legislative reforms, the CNDH recommends that the government:

- Launch a national survey on the phenomenon of human trafficking ;
- Develop, in a collaborative manner, a national plan of action to combat human trafficking ;
- Develop a specific training program to strengthen the capacity of law enforcement officials in their fight against human trafficking ;
- Strengthen cooperation between various departments involved in the fight against human trafficking (border police, national security, gendarmerie, justice, etc.) .
- Strengthen partnerships with organizations against human trafficking and for the protection of victims of abuse.

Concerning documented immigrants, the CNDH invites the government to carry out:

- The revision of articles 24, 25 and 26 of the Dahir No.1-58-376 of 3 Jumada I 1378 (15 November 1958) regulating the right of association as amended and supplemented by Act No. 75-00 and 07-09 aligning the legal status of foreign associations with that of national associations;
- The revision of Articles 3 and 4 of Law No. 9-97 forming electoral code as it has been amended and supplemented by the laws 23-06 and 36-08 and in order to give foreign nationals residing in Morocco the possibility to participate in local elections under the law, the application of the international conventions or practices of reciprocity, in accordance with the provisions of article 30 (§4) of the Constitution ;
- The revision of Article 416 of Law No. 65.99 constituting the electoral code, revised to permit migrant workers access to positions of management and leadership in trade unions to which they are affiliated ;
- The ratification of Conventions Nos. 97 and 143 of the OIT on migrant workers. Similarly, and given the importance of new guarantees offered by Article 8 of the Constitution with regard to trade union freedoms, the CNDH recommends the ratification of the ILO Convention 87 on the Freedom of Association and Protection of the Right to Organize.

Finally, the CNDH invites the government to negotiate systematically, in the framework of bilateral or multilateral economic agreements, and on the basis of reciprocity, the opening of the labor market while protecting the social rights of workers through adequate social clauses.

To succeed, the CNDH considers that this new public policy, urgent and breaking with the situation and current practices, requires an active involvement of all social actors in Morocco and its international partners. In this regard, the CNDH has arrived at the following recommendations that would achieve this objective.

Concerning the Parliament

Considering the central institutional place of the Parliament in the new constitution, which grants it sole authority in crafting and enacting laws, the CNDH urges for Parliament:

- To interact quickly and actively with the bills that the government should submit for discussion and adoption, in accordance with the recommendations listed above;
- To expedite the review of three legislative proposals tabled by parliamentary groups; these proposals were on the fight against racism and human trafficking.

Concerning the media

The CNDH urges the media and Moroccan journalists:

- To refrain from broadcasting any message inciting intolerance, violence, hatred, xenophobia, racism, anti-Semitism and discrimination toward foreigners ;
- To promote a balanced journalistic discussion and analysis of immigration by focusing also on its positive aspects ;
- To combat stereotypes and negative discourses on migration ;
- To actively contribute to awareness against racism and xenophobia.

The CNDH particularly recommends to journalists to be guided in their professional activity by UNESCO guidelines in the Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid

and Incitement to War, as well as those in the Declaration of Principles on Tolerance, adopted by UNESCO in 1978 and 1995, respectively.

Finally the CNDH recommends to the various public and private bodies responsible for the training of professional journalists to take all necessary measures to strengthen and develop, in learning and training, attitudes and behavior based on the recognition of equality, by fighting, particularly by means of appropriate teaching methods, against prejudice and stereotyping of foreigners.

Concerning businesses, the CNDH urges companies

- To ban any recourse to the employment of undocumented persons, and to regularize any employees in this situation ;
- To guarantee equal treatment with respect to wages and social rights ;
- To implement, especially for businesses in contact with foreigners, training programs of awareness about non-discrimination, similar to the program which will be implemented at the initiative of the company Royal Air Maroc to the flight attendants and ground staff, in partnership with the CNDH.

Concerning trade union action

In all countries of the world, union involvement alongside migrants has an important added value, not only for the defense of their rights, but also as instances of insertion of migrants in democratic civic action. In Morocco, the emergence of a group of migrant labor in the Democratic Labor Organization (ODT) in this respect is an excellent initiative.

In this context, the CNDH calls on the trade unions:

- To take into account the vulnerability of migrant workers and include this question in their trade union activities ;
- To develop campaigns to encourage membership of migrant workers in trade unions;
- To support migrants in efforts to pursue equitable settlements in work disputes.

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Corrigendum

Annex

Delete the first paragraph.

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Information presented by the Kenya National Commission on Human Rights*

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Annex

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The Death Penalty in Kenya

I. Introduction

1.1 Kenya National Commission on Human Rights

1. The Kenya National Commission on Human Rights (KNCHR) makes this submission to the Office of the High Commissioner for Human Rights ahead of the high level panel discussion on the question of the death penalty.

2. KNCHR is an independent National Human Rights Institution with 'A status' accreditation. The Commission was originally a statutory body established under the KNCHR Act of 2003. With the promulgation of the 2010 Constitution, the Commission was re-established under Article 59 (4) of the 2010 Constitution and for that reason, enjoys Constitutional protection as a Constitutional Commission.

3. Pursuant to the KNCHR Act (No.14 of 2011), the Commission is mandated to act as the principal organ of the State in promoting and protecting human rights for all in Kenya. In line with the new constitutional dispensation and in keeping with the expansive Bill of Rights, KNCHR recognizes the right to life as a fundamental human rights and is on the fore front in advocating for the full abolishment of the death penalty in law.

1.2 Overview of the Kenyan situation

4. The death penalty has been part of Kenya's legal system for the last 120 years[1]. In the East African Region, Kenya has the highest number of death row inmates (1558 –up from 1,140 by the end of 2011 (30 of these are women). Uganda by comparison had 505 prisoners on death row. The Statistics have not always been low in Kenya but helped by the commutation of some 4,000 death sentences to life imprisonment. Currently, there are around 8,000 capital punishment cases in remand, awaiting trial. The numbers of people executed from 1963 to 1987 were 280.

5. The international trend toward abolition reflects a shift in the death penalty paradigm. Whereas the death penalty was once viewed as a matter of domestic penal policy, now it is seen as a human rights issue. The 2nd Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) calls for abolition of the death penalty. Protocols 6 and 13 to the European Convention on Human Rights as well as the Additional Protocol to the American Convention on Human Rights also call for abolition of the death penalty.

6. Many human rights organizations and intergovernmental organizations, such as the European Union, see the death penalty as one of the most pressing human rights issues of our time and accordingly have taken an active role in persuading countries to halt executions.

II. Kenya and the Death Sentence

2.1 The Law

7. The Kenyan Penal Code provides for a mandatory death penalty for the crimes of murder (Section 204), robbery with violence (Section 296(2), attempted robbery with violence (Section 297(2) of the Penal Code), administering an oath purported to bind a

[1] 70 years through colonialism and more than 50 years since independence

person to commit a capital offence (Section 60 of the Penal Code) and treason (Section 40(3). The method of execution is by hanging.

8. There has been a de facto moratorium of the death penalty in force in Kenya since 1987; however the death penalty still remains in the laws of Kenya. The difficulty with the legal provisions is that the death sentence is not reserved for the most serious crimes. The sentence for robbery is 14 years imprisonment but Section 296 (2) provides that *'If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.'* The difficulty is with this broad definition of robbery with violence, which could see one end up on death row for the mere fact that he was in the company of another, even where no actual violence is used. In fact, from the survey conducted, majority of those on death row are robbery with violence offenders.

9. As the country continues to ratify international treaties, the conflict between such treaties and the domestic law becomes glaring. The International Crimes Act (Cap 16) for instance, provides that the provisions of the Rome Statute relating to penalties shall have the force of law in Kenya. The irony is that if one were to be tried under this Act, for committing genocide, crimes against humanity or war crimes, the person would be liable to a maximum sentence of life imprisonment as provided under the Rome Statute. Compare this to one sentenced to death sentence for robbery with violence and the irony becomes very clear.

10. In 2003, the former President, Mwai Kibaki commuted 223 death row convicts to life imprisonment. This included 28 prisoners who were subsequently released after serving between 15 and 20 years on death row. The then Vice- President, Moody Awori, when releasing the 28 death row prisoners, stated his intention to introduce a Bill in Parliament to abolish the death penalty. The then Commissioner of Prisons, Abraham Kamakil, termed the 2003 mass commutation a "historic event", saying that the death penalty should be abolished because it claimed innocent lives. He observed, "We are longing for the day Parliament will remove the death penalty from our Constitution." The same views were echoed by the then Minister for Justice and Constitutional Affairs, Hon. Kiraitu Murungi, who reiterated that the death penalty, being a violation of human rights, should be abolished and death row convicts would soon have their sentences commuted to life.[2]

11. On 8 March 2009, then Vice-President Kalonzo Musyoka said the Kenyan government was reviewing the death penalty. The Vice-President said his office was consulting with the Attorney-General and the President's offices to chart the way forward. He stated that "some African countries like Rwanda have already abolished the death penalty; we may go in that direction if there is consensus."[3]

12. In 2009, President Kibaki commuted the death sentences of more than 4,000 death row in-mates. This has been termed as was the biggest known mass commutation of death sentences to life sentences anywhere in the world.[4] The President also issued a directive to all relevant Government Ministries and Departments to conduct empirical studies and engage all stakeholders urgently, to determine whether the continued existence of the death penalty in the laws of the land has any value or impact in the fight against crime.[5] This was

[2] KNCHR, Position paper no 2 of 2007, para.14

[3] Penal Reform International, The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda, pg.10. available at www.penalreform.org

[4] Ibid

[5] Kenya's National Report to the Human Rights Council Working Group on the Universal Periodic Review, para.38, available at http://daccess-dds-

done in recognition of the fact that 'extended stay on death row causes undue mental anguish and suffering, psychological trauma, anxiety and constitutes inhuman treatment.'[6] Three years later, the results of these studies remain unknown, all indications being that such studies were never actually carried out.

13. The courts have continued to issue the death sentence. A budgetary allocation is made each year for servicing of the gallows on the understanding that for as long as the death sentence remains in the statutes, the means of execution must be available at all times. The difficulty with the Kenyan situation is that the sentences are passed but are not carried out; leading to overcrowding of the death-row blocks in the prisons.

2.2 The Judiciary

14. In 2010, the Court of Appeal egged the country towards abolition when it held in the Mutiso[7] case that the mandatory death penalty was unconstitutional. The Appeal Judges declared section 204 of the Penal Code (which provides for mandatory death sentence for murder) inconsistent with the letter and the spirit of the Constitution to the extent that it provides that the death penalty is the only sentence for murder. The Section was also declared to be antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. The Court further referred to decisions from other jurisdictions[8] which had held that holding a prisoner on death row for longer than three years amounted to cruel and inhuman treatment. The Court lamented that '*Unfortunately in this country no one, as far as we are aware, has raised the issue of whether the delay in execution of prisoners who have been on death row for a long period of time is inconsistent with constitutional provisions and such issue is not raised before us in this appeal.*' [9]

15. A reverse position was adopted by the High Court which held in 2011[10] that the death penalty was the only sentence imposable in law for murder and that the Court of Appeal's take on the issue was a significant step in the wrong direction. The Judge in this instance further described the President's commutation of 4,000 death sentences to life imprisonment as utter disregard of his constitutional duty, stating: *"The President should have exercised his cardinal responsibility of signing all the pending death warrants. To fail to exercise a legal duty is an abrogation of trust and breach of duty."* The Judge wondered why it would be said that the death penalty is cruel and inhuman, stating: *"It is also alleged that death penalty is a cruel and inhuman punishment but what about the loss of life, as a result of the unlawful act of the accused. In my view loss of someone's life is equal and amounts inhuman treatment. The person who is responsible for the loss must pay for it in equal measure or commensurate to the suffering of the victim or his family.''*

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ny.un.org/doc/UNDOC/GEN/G10/110/47/PDF/G1011047.pdf?OpenElement

[6] Ibid

[7] Godfrey Ngotho Mutiso vs. Republic, available at http://kenyalaw.org/Downloads_FreeCases/76411.pdf. This was also followed in David Njoroge Macharia v Republic [2011] eKLR

[8] Specifically Catholic Commission for Justice and Peace in Zimbabwe vs. the Attorney General & Others (1993) 2LRC 277, where it was held that that the prolonged delay on the death row had adverse effect on the condemned prisoners' physical and mental state as a result of *"the death row syndrome"* which, as internationally accepted, amounts to cruel, inhuman or degrading treatment which is prohibited by the constitution. The court set a time limit of three years for holding any person on death row after completion of the appellate process.'

[9] Ibid,para.19

[10] Republic vs. Dickson Mwangi Munene and another, available at http://kenyalaw.org/CaseSearch/view_preview1.php?link=294557420841295534803O1

16. The legal system cannot be full proof and mistakes in the administration of justice will be made as was noted in the case of Joan Chebichii Sawe[11] who had been sentenced on circumstantial evidence. As Justice Thurgood wrote[12], "no matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony and human error remain too real". It is not easy to determine how many innocent persons have been executed in Kenya but given that the judiciary has not been perceived as faultless, it is certain that there are many innocent people who have been sentenced to death.

2.3 International Efforts; 'We want to abolish, but the public is not with us'

17. In 2007, 2008 and 2010, Kenya abstained from voting on the United Nations (UN) General Assembly (GA) resolutions calling for a moratorium on the use of the death penalty. However, although Kenya did not vote in favour, it did not sign the *Note Verbale of Dissociation.*

Before various UN bodies, Kenya has maintained a now familiar refrain of wanting to abolish the death sentence but not being able to convince the public to agree to abolition.

2.3.1 CAT Committee (2008)

18. When the State was reviewed by the statement to the UN Committee against Torture in 2008, the Kenyan representative stated that *"[w]e are aware that this [the de facto moratorium] is still not a satisfactory situation, but until a new constitutional dispensation is agreed upon, this is the most humane option so far available. The Government and the Kenya National Commission on Human Rights, in collaboration with civil society organizations, have been educating Kenyans on the global trends on the issue of the death penalty. The Government expects these efforts will be fruitful and that eventually the citizens will be won over and Kenya can then become a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights.'*[13]

19. The Committee in its concluding observations urged the State to take the necessary steps to establish an official and publicly known moratorium of the death penalty with a view of eventually abolishing the practice. The State party should take the necessary measures to improve the conditions of detention for persons serving on death row in order to guarantee basic needs and rights.

2.3.2 Universal Periodic Review (2010)

20. In February 2010, Kenya notified the United Nations Human Rights Council that the de facto moratorium on the death penalty would remain in place, although it rejected calls to abolish the practice.

21. In May 2010, during its review by the UN Human Rights Council Working group under the UPR, a number of states urged Kenya to abolish the death penalty.[14] The State initially disregarded these recommendations, stating again that it could not abolish the death

[11] Joan Chebichii Sawe V Republic, Criminal Apeal no 2 of 2002

[12] Furman v Gergia, 408 U.S 238, 367-68 [1972]

[13] Statement by the Minister for Justice, National Cohesion and Constitutional Affairs, Hon. Martha Karua, at the Presentation of Kenya's Initial Report under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Geneva, 13–14 November, 2008

[14] Recommendations included 'Amend national legislation to abolish the death penalty so it is completely prohibited, and sign and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (Spain); establish a de jure moratorium on capital punishment, with a view to abolishing the death penalty (Belgium); take all measures to abolish the use of the death penalty (Uruguay); abolish the death penalty (Ireland, Austria, Germany); suspend the application of the death penalty and definitely abolish it (Argentina);

penalty since the Kenyan public had overwhelmingly rejected the abolition of the death penalty for the most serious crimes. The Government, in collaboration with the Kenya National Commission on Human Rights and other stakeholders, continued to raise public awareness regarding the abolition of the death penalty[15]

22. In September 2010 at the adoption of its Report by the Human Rights Council, the State indicated that it had totally rejected only one recommendation (on the rights of sexual minorities). This implied therefore that the recommendations on abolition of capital punishment were accepted.

2.3.3 Human Rights Committee (2012)

23. In July 2012, during the review of the State report by the Human Rights Committee, the State indicated that it had continued the policy of non-execution since 1987. However, it had not been able to remove the death penalty from the statute books due to the cultural situation as the public remains anti-abolitionist.[16] The State further indicated that it was working with civil society, religious organizations and KNCHR to create awareness on the issue and it was confident that the position of *Macharia* and *Mutiso* will prevail regardless of the conflicting cases.

2.3.4 CAT Committee, 2013

24. In May 2013, Kenya's Second Periodic Report was reviewed by the Committee against Torture. Again, the Committee raised the issue of abolition of the death penalty but the state's response was that the public was not willing to abolish and that the constitution of Kenya, passed in 2010, allowed for the death penalty. As such, the state was unable to abolish the sentence. In its concluding observations, the Committee again urged the state to work towards abolition of the death penalty.

III. KNCHR's work on abolition of the Death Sentence

25. Kenyan National Commission on Human Rights (KNCHR) has been in the fore front for advocating against the death penalty in Kenya. In 2007, KNCHR published a position paper[17] advocating the abolition of the death penalty on grounds that it violates the constitutional guarantees of the right to life and the right to be free from cruel and inhuman punishment. The Position Paper called upon the Government to take immediate steps to fully abolish the death penalty in law and practice and implement life sentences for the most serious offences as well as amend all laws[18] that permit death penalty. In its Occasional Report19 published in 2012, KNCHR again expounded on the Right to life and called for abolition of the death sentence.

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[15] Kenya, Report of the Working Group on the Universal Periodic Review, para.104, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/88/PDF/G1014488.pdf?OpenElement

[16] Though this is the claim by the State, there has been no public survey conducted to establish the credibility of this assertion.

[17] Kenya National Commission on Human rights: Position Paper N0. 2 on the Abolition of the Death Penalty>Available on http://www.knchr.org/Portals/0/CivilAndPoliticalReports/PP2%20-%20Abolition%20of%20the%20death%20penalty%20-%20final.pdf

[18] Sec 204, 40(3), 296(2) and 297(2) of the Penal Code, CAP 63 Laws of Kenya.

[19] Making the Bill of Rights Operational: Policy, Legal and Administrative priorities and considerations> Available at http://www.knchr.org/Portals/0/OccasionalReports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf

26. Internationally, KNCHR advocated for recommendations on abolition of the death penalty during the State's first review under the Universal Periodic Review in May 2010 and the Human Rights Committee in July 2012. Interestingly, in both forums, the State indicated that while the public was anti-abolitionist, it was working with KNCHR to create awareness on the need for abolition.

27. KNCHR's concern is that there has never been a survey undertaken to determine the public's views on capital punishment. Reliance is often placed on the fact that having passed the new constitution[20] which permits limitation of life, the public voted for retention of capital punishment. However, capital punishment was not isolated as an issue for discussion during the referendum[21] and it would be safe to say that the public may not have appreciated the import of Article 26 of the Constitution with regard to capital punishment.

28. In the last half of 2011, KNCHR conducted surveys[22] amongst death row inmates to determine the effects of the sentence on the inmates and their families. The results of this survey revealed an urgent need to address capital punishment. KNCHR found that the death penalty has severe physical and psychological impacts on inmates, possibly amounting to torture or cruel, inhuman and degrading treatment or punishment under international law.

29. Inmates felt that the death penalty causes significant "mental displacement", as one inmate termed it, because they are not certain about if or when they will be executed. They explained that many of them had developed ulcers and other stress-related illnesses since being condemned to death. The indecisiveness of the government was aptly captured by one of the inmates who stated *"I live cursing the government every other day due to the treatment we get arising from this sentence...There are only two options the government has in regard to this sentence: either hang or commit a person to a term sentence. Let the government take a stand"*

30. The survey also revealed serious deficiencies in the criminal justice system with regard to legal representation, fair trials, access to appeal, and the opportunity to mitigate sentences. The majority of inmates interviewed lacked any form of legal representation during their trials or appeals. This presents a serious problem as most criminal defendants find the legal process and legalese difficult to understand and cannot adequately represent themselves in court.

31. Currently, state-funded legal representation is only officially provided for murder suspects, despite the fact that suspects for robbery with violence also face the death penalty. While most inmates reported that they had been allowed to offer mitigating circumstances during sentencing, several also indicated that they did not offer any mitigating circumstances because they believed it would amount to a confession of guilt. Indeed, without legal representation, it is unlikely that most defendants can actually take advantage of mitigating opportunities during sentencing.

32. A number of inmates felt that the courts of first instance were biased against them, perhaps because of their physical proximity to the communities where the alleged crimes took place. Inmates reported substantial delays in the appeal process, with several noting that people could spend up to 10 years waiting for their appeals to go through.

33. The Penal Code of Kenya provides for a mandatory death penalty for the crimes of murder and robbery with violence. In 2010, however, the Court of Appeal held in the

[20] Constitution of Kenya, 2010> Available at http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf

[21] A constitutional referendum was held in Kenya on 4 August 2010 where Kenyans turned out in large numbers to vote for the new Constitution

[22] Survey conducted by KNCHR in 2011 in Kenya prisons.

Mutiso case that the mandatory death penalty for murder violated the right to life and was a form of inhuman punishment. The decision allowed for murder defendants to mitigate their sentence and stated that holding a prisoner on death row for longer than three years would no longer be permitted. The Court also stated that the reasoning in the decision should extend to other crimes like robbery with violence and treason where the death penalty is mandatory. Despite this decision, the Penal Code has not been revised to eliminate the mandatory death penalty, and it is unclear whether judges are aware of and apply the ruling in *Mutiso* to cases before them.

34. Despite the moratorium on the death penalty and the ruling in the *Mutiso* case, death sentences continue to be issued and exact a serious toll on inmates. The adverse psychological effects of the death penalty are compounded by injustices within the criminal justice system. These include a lack of legal representation for indigent defendants, delays in the appeal process, and lack of judicial capacity, among others.

35. As a continuing part of this work, KNCHR undertook prison visits at the end of June 2012 in various parts of the country to observe and collect first-hand information from death row convicts on their experiences, perceptions, feelings and general psychological impacts of being on death sentence. This prison visits were among other KNCHR's efforts aimed at informing the shadow report on Kenya to the UN Committee against Torture (CAT Committee). The prison visits and survey undertaken by KNCHR is also a pointer towards an evidence-based advocacy on the death penalty and penal reforms.

3.1 Summary of prison visits

36. The results of the survey indicated that the death penalty has serious psychological effects on inmates. Many of the inmates interviewed stated that they felt they were being "strangled" every day that they were on death row, while others stated that they had essentially been killed the day they were condemned to death.

This section details the various ways in which the death penalty and being on death row indefinitely affects inmates physically and psychologically.

i) Inmates' lack of understanding about their sentences

37. Many inmates reported that they were not told how their death sentence would be carried out, and this caused them a great deal of anxiety. Many inmates relied on accounts from fellow inmates on how people had been executed in the past, and were told that others had been executed by machines in the past. Again, this second hand information only served to increase their pain and fear about their sentence.

38. Furthermore, the inmates at Nairobi's Kamiti Maximum Security Prison reported that they had initially been unclear as to their sentence because the judge was inaudible during sentencing, delayed issuing the sentence, or refused to issue the sentence in open court. Inmates also reported that they were shocked when they received the death sentence.

39. Inmates felt that the death penalty causes significant "mental displacement", as one inmate termed it, because they are not certain about if or when they will be executed. They explained that many of them had developed stress-related illnesses since being condemned to death. There was a consensus among inmates that the death penalty should be abolished and prisoners given sentences with definite end dates that would allow them to return to their families and communities.

ii) Death row inmates held in isolation

40. Once the death sentence is issued, inmates noted that they were quickly removed from the courthouse and taken to prison without having the opportunity to see their families. The inmates at Kamiti Maximum Security Prison reported that they were held in an isolation chamber for two weeks after receiving their sentences. They reported that this

cell was close to the gallows, which were still functional. They reported that, while being held in isolation, they could hear the engine of the machine while it is being serviced and that this caused them distress.

iii) Stigma against death row inmates within the prison

41. Even once death row prisoners are integrated into the larger inmate community, many of them continue to be isolated from prisoners with lesser sentences. The prisoners in Kamiti Maximum, for example, noted that they are only allowed to mingle with other inmates at church on Sunday. Additionally, the condemned women in Kakamega Women's Prison[23] were made to wear uniforms with "Condemned" embroidered in red on their chests. This labelling further separates them from their fellow prisoners and stigmatizes them.

iv) High security and limited movement within prisons

42. Inmates also reported that their physical movement within the prison was highly curtailed. They were always accompanied by guards, and if they had to leave the prison compound they had to be chained. They reported that the constant monitoring and regulation of their movements caused them psychological distress. Some prisoners also reported that they were concerned that people from their communities would see them chained and guarded while outside the prison.

43. Officers stationed at the prisons reported that death row inmates were a higher security risk because they did not care about the future due to their sentence. One inmate in Bungoma24, for example, stated:

I have tried to escape twice from this prison but I have been caught and brought back in both occasions. But that is not the end of it because I am still making such attempts and the day I will succeed no one could wish to know what I will do to someone before I am re-arrested because I am sure I will.

v) Separation and emotional impact on families

44. Separation from their families also caused the inmates a great deal of mental anguish. Several inmates explained that their families were not aware of their whereabouts and that their families believed that they were dead. This resulted in a breakdown of the family unit with spouses either falling ill, dying of stress-related diseases, or running away to start a new family. The result was that children grew up in broken homes without the guidance and support from one of their parents. Many of these children are labelled as "children of killers", according to inmates in Kakamega Main Prison. In Nyeri Prison[25], one condemned woman was in prison with her eight month old baby.

45. Inmates also felt great distress over the fact that they could not support their families while in prison. According to one inmate:

vi) The separation [from family] is hard. One of my children had to leave school because we could not pay the school fee [since he went to prison].

46. The separation and inability to support their families caused continued stress and anxiety amongst the inmates, most of who were bread winners and now remained uncertain of their families' well-being. Families often go into mourning as soon as the death sentence is pronounced; for example, in the Luhya community, a banana stump is buried to symbolize the "death" of the person who is on death row.

[23] Located in the Western region of Kenya.
[24] Bungoma is a town located in Bungoma County in Western Kenya.
[25] Located in Central Kenya

47. Many inmates reported that their families did not visit them in prison. When they did, the inmates were restricted behind bars while chained and unable to move freely. According to one inmate in Bungoma:

My children visit me so at least I feel that my family cares for me. But we have to talk through barbed wires. If only we could sit around a table and eat and talk.

vii) Health concerns in prisons

48. Some inmates expressed concern that the stress in prison caused prisoners to engage in sodomy or to trade sexual favors. They expressed concern that this led to high rates of HIV infection as well as other sexually transmitted infections. Inmates in Kakamega Main Prison also stated that conditions for aging inmates should be improved. One of the condemned inmates at Kakamega was a man of about 60 years of age who was on a catheter. According to one inmate:

We are facing great health risks here, kuna watu kazi yao ni kuambukiza tu wengine ugonjwa. Wengine wetu walikuja hapa tukiwa sawa na sahii wako na ugonjwa na hata hawezi jua sababu hakuna mtu hujali mambo ya kupimwa gerezani (there are people bent to infecting others with HIV. Some of us came here when free of HIV but are now infected but they are not aware because no one cares about HIV test for prisoners).

viii) Lack of rehabilitative services

49. Inmates in Bungoma and Kakamega reported that they did not have the opportunity to participate in any type of industry or educational activity. This was because they were either seen as high risk inmates or because of their ambiguous status hence no chance at rehabilitation was afforded to them because it was not clear what their sentence was desired to achieve. Indeed, even where their sentences have been commuted to life, their files still read 'death sentence' and as such they were still limited in their movement and the type of activities they could participate in.

ix) Treatment in prisons

50. The majority of prisoners surveyed reported that they were not mistreated by the prison authorities, though at least one prisoner reported that the guards occasionally beat prisoners. Many inmates noted that they were not allowed to work or read, were limited in their ability to move freely around the prison yard, and were segregated from other convicts. According to one of the condemned prisoner in Bungoma;

"I live cursing the government every other day due to the treatment we get arising from this sentence...There are only two options the government has in regard to this sentence: either hang or commit a person to a term sentence. Let the government take a stand"

IV. Deficiencies in the Criminal Justice System

xi) Lack of legal representation

51. The majority of inmates interviewed lacked any form of legal representation during their trials or appeals. This presented a serious problem as most criminal defendants find the legal process and legalese difficult to understand and cannot adequately represent themselves in court. Currently, state-funded legal representation is only officially provided for murder defendants, despite the fact that defendants for robbery with violence also face the death penalty. Interviews in Bungoma and Kakamega indicated that prisoners often

relied on other prisoners who had already completed their appeals to assist them with the paperwork for their own appeals. Some of the inmates interviewed at Eldoret[26] had received legal representation from the State but felt that the representation was incompetent and noted that their advocates had not bothered to offer mitigating circumstances or explain the sentence to their client in simple terms.

52. The Constitution of Kenya 2010 provides that every accused person has the right to receive the assistance of an advocate at the State's expense "if substantial injustice would otherwise result" (Section 50(2) (h)). It is clear that a substantial injustice results when an accused person is convicted and sentenced to death without having the opportunity to put forward an adequate defense with the assistance of a trained advocate.

xii) Problems with accessing bond

53. An inmate in Kakamega Main Prison reported that it was very difficult for most defendants to pay the high bond required for robbery with violence. Other inmates advocated that they should be able to access bond during their appeal process.

xiii) Disproportionate sentences and problems with the sentencing process

54. The majority of inmates interviewed were condemned for the crime of robbery with violence, and many inmates indicated that they thought the death penalty was a disproportionate sentence for this offense. The interviews at Nyeri Men's and Women's Prisons indicated that people may be charged and convicted of robbery with violence for less serious offenses, such as wielding a pen knife while stealing a cell phone. Again, these accounts seriously call into question whether the death penalty is a proportionate sentence for such crimes.

55. Additionally, several inmates at different sites were under the impression that the death sentence is still mandatory for murder and robbery with violence in Kenya, despite the fact that the Court of Appeals in the *Mutiso* case found that the mandatory death penalty violated the right to life and amounted to inhuman punishment. The mandatory death sentence is still a part of the Penal Code despite the *Mutiso* decision.

xiv) Delays in the appeal process

56. Inmates reported substantial delays in the appeal process, with several noting that people could spend up to 10 years waiting for their appeals to be heard and determined. Inmates interviewed in Eldoret had been on death row for 3-5 years on average were all waiting for their appeals to go through. Several inmates noted that files are often lost or are not transferred with prisoners when they are taken to a different prison. They also stated that they often must pay bribes to registry clerks in order to ensure that their files were transferred properly.

xv) Lack of judicial capacity

57. The inmates explained that in some places such as Bungoma, there was only one judge. This presented a problem since some reviews and appeals required a two judge bench. Without two judges, the inmate must be transferred to another prison for their review or appeal hearings. Inmates explained that this could take a physical and psychological toll since different prisons have different rules and regulations depending on their security level and administration.

58. Furthermore, inmates reported that the presiding judge or magistrate was transferred in the middle of their trial and replaced with a different official. Thus, the judge or

[26] Eldoret is located in the Rift Valley region of Kenya.

magistrate that issues the final ruling often does not experience the full trial and this may hinder their ability to rule fairly on the case.

V. Alternative to the Death Penalty

59. Most of the inmates interviewed thought that the death penalty should be abolished and replaced with a set sentence, perhaps of 10 years, with the opportunity for parole. It should be noted that some inmates did support the death penalty for the crime of murder. Many inmates strongly opposed life sentences, which they saw as a living equivalent of the death penalty. The inmates also thought that, during sentencing, the judge should take into account the age of the person so that young people can have an opportunity of reforming and reintegrating back into their communities.

60. It was further noted that the death penalty contributes to congestion in prisons, since condemned inmates do not have the opportunity for parole. Additionally, the security required to guard a large population of condemned inmates is quite expensive for the prisons.

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Information presented by the Equality and Human Rights Commission of Azerbaijan*.

Note by the Secretariat

The Secretariat of the Human Rights Council hereby transmits the communication submitted by the Equality and Human Rights Commission of Azerbaijan,** reproduced below in accordance with rule 7(b) of the rules of procedures described in the annex to Council resolution 5/1, according to which participation of national human rights institutions is to be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005.

* National human rights institution with "A"-status accreditation from the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

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Annex

[English only]

Information presented by the Commission for Human Rights (Ombudsman) of the Republic of Azerbaijan by Prof. Elmira Suleymanova for the 25th Session of the Human Rights Council.

The thematic panel dedicated to the sixty-fifth anniversary of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide

The Nagorno Karabakh conflict became as one of the most tragic conflicts in the history of XX century and acts of genocide were committed by Armenians against population of Khojaly and other districts of Azerbaijan.

The legal definition of the Genocide is found in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG). Article 2 of this Convention defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group".

In spite of that Armenia ratified this Convention, but it does not fulfill the norms of this document and other international treaties. All of the above mentioned were applied in Khojaly events. As known in 1988 the territorial claim of Armenia to Azerbaijan, resulted with a loss of twenty percent of Azerbaijani territories, including the Nagorno Karabakh and seven surrounding districts. As a result about one million of the Azerbaijan civilians became refugees and IDPs. Resolutions, passed by United Nations Security Council (822, 853, 874, 884 numbered), which demand unconditional liberation of the occupied territories, are not fulfilled by Republic of Armenia till now.

At the night from February 25th to 26th of 1992, Armenians grounded and exposed Khojaly, historical and ancient settlement of Azerbaijan, to heavy shooting to the habitants-elderly persons, women and children mercilessly. Armenians with the support of military equipment and personnel of the 366th moto-artillery regiment of the Soviet Army stationed in Khankendi committed genocide – the most terrible tragedy unseen in the history against of mankind. The town of Khojaly surrounded from 4 sides was under artillery fire for several hours and then the Armenians entered to the town and burned it. That freezing winter night when the peaceful population that managed to escape from the town trying to save their lives were unexpectedly and unawares exposed to fire attaks and killed in an ambush set beforehand on the road between Agdam and Askeran.

During this event 613 peaceful Azerbaijanis, including children, women and elderly have been killed with special cruelty. 8 families have been completely annihilated, 1275 inhabitants – were taken hostages and subjected to extreme insults and tortures. The destiny of 150 hostages, including 68 women and 26 children remains unknown till now. The executioners scalped the killed people, cut out their bodies, pricked out eyes, ripped up stomachs of pregnant women, buried alive or burnt people. The Khojaly tragedy became

new bloody page of the genocide and the ethnic cleanse carried out by brutal Armenian nationalists against Azerbaijanis in last hundred years.

"The Action Plan on 22nd Anniversary of the Khojaly Genocide" was approved, under which press conferences, commemorative ceremonies, issuing the materials on Khojaly massacre in foreign and local mass media, teleradio channels and on the internet pages, devoting the first lessons in educational facilities to the Khojaly massacre.

West Virginia State's House of Representatives (USA) passed a resolution on the Khojaly tragedy. This Resolution commemorates that Khojaly tragedy is a part of the military aggression carried out by Armenian military troops in Nagorno Karabakh region of Azerbaijan since 1988. Earlier, legislative bodies of other States of the US such as California, Massachusetts, Texas, New-Jersey, Maine, New Mexico, Arkansas, Georgia, Oklahoma, Tennessee, Pennsylvania, Connecticut, Florida and Mississippi had also passed the related resolutions and demanded subjecting of perpetrators of Khojaly massacre to the criminal responsibility.

Already, the Parliaments of Canada, Mexico, Columbia, Peru, the Republic of Pakistan, Bosnia and Herzegovina, Romania, the Czech Republic and Jordan also recognized the Khojaly genocide.

It were taken a number of actions by the Commissioner for Human Rights of the Republic of Azerbaijan on Khojaly genocide. There were addressed the statements about the serious violations of human rights and humanitarian law to the United Nations, Organization for Security and Cooperation in Europe, Council of Europe, European Union, Organization of the Islamic Conference, Commonwealth of the Independent States, and other international organizations and governments of the world countries calling them to recognize the Khojaly genocide and condemn those perpetrators take effective measures to prevent such crimes in the future, and assist in a peaceful resolution of the Armenia-Azerbaijan, Nagorno-Karabakh conflict on the basis of the norms and principles of the international law, including the principle of territorial integrity of states.

Expressing the sovereign will of the people, the Commissioner states once again that the Republic of Azerbaijan will never agree with violation of sovereignty in its territory and occupation of its lands, serious violations of human rights and will use all possible means to restore its territorial integrity, and achieve international political and legal assessment of the Khojaly tragedy and punishment of its ideologists, organizers and performers of this act of genocide.

The Commissioner also attended international conference dedicated to the 20th anniversary of Khojaly genocide and organized by the Embassy of Azerbaijan in Hungary together with Budapest Foundation for the International Prevention of Genocide and Mass Atrocities. During the event a group of Parliamentarians of Hungary supported justified position of Azerbaijan.

We urge the international organizations to recognize Khojaly tragedy as an act of genocide in compliance with the international legal norms and principles. The territorial integrity of Azerbaijan must be restored, the Azerbaijani captives and hostages shall be liberated, violated rights of refugees and IDPs shall be restored and they must be returned to their homes.

United Nations A/HRC/25/NI/5

General Assembly

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Human Rights Council
Twenty-fifth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Information presented by the Northern Ireland Human Rights Commission*

Note by the Secretariat

The Secretariat of the Human Rights Council hereby transmits the communication submitted by Northern Ireland Human Rights Commission,** reproduced below in accordance with rule 7(b) of the rules of procedures described in the annex to Council resolution 5/1, according to which participation of national human rights institutions is to be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005.

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Annex

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Annex

[English only]

Contribution relating to the thematic report of the Special Rapporteur on the Promotion of the enjoyment of the cultural rights of everyone and respect for cultural diversity, Farida Shaheed

Information presented by the Northern Ireland Human Rights Commission on The Derry/Londonderry Report on Upholding the Human Right to Culture in Post-Conflict Societies

Foreword

The Northern Ireland Human Rights Commission (the Commission) is mandated as a national human rights institution to uphold all of the human rights in the international human rights treaties. These include the right to culture. However, the Commission has found that little attention has been paid to cultural rights in human rights discourse. In particular, the promotion and protection of cultural rights in societies emerging from conflict is a neglected area. Little guidance exists for States, cultural stakeholders and such human rights actors as national human rights institutions as to how best to uphold cultural rights in such contexts. This gap is of particular concern for the promotion of cultural rights in Northern Ireland, a society that is emerging from decades of conflict. It is in order to redress this gap in literature and policy guidance that the Commission is publishing the present report.

The report is set against the backdrop of the designation of Derry/Londonderry as UK City of Culture 2013. The experience of that city as City of Culture is used as a case study in relation to the realisation of cultural rights in a post-conflict society. As part of the UK City of Culture initiative, the Commission organised a conference and consultation on cultural rights in divided and post-conflict societies in association with the University of Ulster and in co-operation with the UN Special Rapporteur in the Field of Cultural Rights, Ms Farida Shaheed. This event took place in Derry/Londonderry from 1 to 3 July 2013 and the discussions that took placed informed the finalisation of the current report as well as the attached recommendations. (See Annex A for a full list of participants.)

The research for the report was led on behalf of the Commission by Dr Elizabeth Craig, with the contributions of Stratis-Andreas Efthymiou and Ciara O'Connell, all of the University of Sussex. The researchers and those who participated in the Derry/Londonderry meetings are owed the profound thanks of the Commission. We particularly appreciate the enthusiastic support and engagement on the part of the Special Rapporteur, Ms Shaheed.

The report concludes with a set of recommendations that are intended to contribute to the protection of cultural rights in post-conflict societies internationally.

We hope that you will find the Derry/Londonderry Report, with its conclusions and recommendations, to be of value in clarifying the content and the application of cultural rights in the context of societies emerging from conflict. We trust that the conclusions and

recommendations will be of assistance in guiding States and all human rights actors in charting a path that best honours these crucial human rights.

The former Chief Commissioner of the Northern Ireland Human Rights Commission, Professor Michael O'Flaherty, was the architect of this initiative and we are indebted to him for his insight and leadership in this innovative area.

John Corey

Interim Chair, Northern Ireland Human Rights Commission

January 2014

I. The International Legal Framework: Cultural Rights as Human Rights

1. Culture is understood for the purpose of this report as a 'shared system of meaning that people use to make sense of the world' that is expressed in a variety of different ways.[1] According to Ross, '[a]ttention to symbols, rituals and the narratives that members of a group use to make sense of the world is key to understanding how culture shapes their lives and their collective behaviours.'[2] It has furthermore been argued that participants of culture 'experience their traditions, stories, rituals and symbols, tools and material living conditions through shared, albeit contested and contestable, accounts.'[3] It is clear that in post-conflict and divided societies cultural expression can serve both as a marker of division and as a way of transcending difference.[4] This report therefore focuses in particular on the implementation of cultural rights in a way that either reinforces existing cultural narratives or that provides an opportunity for broadening understanding of what it means to speak of a right to culture.[5] The report considers cultural rights as a separate category of rights to those rights provisions dealing exclusively with education and minority and indigenous languages. Whilst it is clear that education, language and culture are inextricably connected, the focus of this report is on cultural rights as a category of rights that historically has been neglected by the international human rights community.

1.1 Cultural Rights in the International Bill of Rights

2. This section of the report focuses specifically on the right of everyone to participate in cultural life and the right of those belonging to minority groups to enjoy their own culture as universally recognised rights.

(a) Right to Participate in Cultural Life – Art 15 ICESCR

3. The most detailed elaboration of a human rights approach to 'culture' is found in the Committee on Economic, Social and Cultural Rights' General Comment on the Right of Everyone to Take Part in Cultural Life.[6] The view of culture adopted in the General Comment is one that is 'broad, inclusive… encompassing all manifestations of human existence. The expression "cultural life" is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.'[7] It stresses that culture should not be seen 'as a series of isolated manifestations or hermetic compartments, but as an interactive process, whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity.'[8] There is however no real reflection in the General Comment of the particular challenges

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[1] Marc Howard Ross, *Cultural Contestation in Ethnic Conflict* (Cambridge University Press 2007) 2, who draws upon Geertz's definition of culture as "an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and their attitudes toward life" (Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973) 89).

[2] Ibid.

[3] Seyla Behabib, The Claims of Culture: Equality, Diversity in the Global Era (Princeton University Press 2002) 5.

[4] Ross (2007) op. cit., 2.

[5] See generally Ross (2007), op. cit.

[6] Committee on Economic, Social and Cultural Rights: General Comment No. 21: Article 15(1)(a) The Right of Everyone to Take Part in Cultural Life (21 Dec. 2009) UN Doc. E/C.12/GC/21,

[7] Ibid., para. 11.

[8] Ibid., para. 12.

and threats in post-conflict and divided societies where there are often competing and contested cultural narratives.

4. As with other economic, social and cultural rights provisions, Article 15 confers specific legal obligations to respect, protect and fulfil the right in question with a focus on availability, accessibility, acceptability, adaptability and appropriateness. This requires non-interference with the exercise of cultural practices and access to cultural goods and services and steps to prevent third parties from interfering in the right. It also requires appropriate measures (whether legislative, administrative, judicial, budgetary, promotional or other) to ensure full realization of the right, including 'preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods.'[9]

5. The obligation to fulfill requires positive measures such as supporting public institutions and the cultural infrastructure for the implementation of policies aimed at protecting and promoting cultural diversity, granting financial and other assistance to relevant actors as well as '[t]asking appropriate measures to remedy structural forms of discrimination so as to ensure that the underrepresentation of persons from certain communities in public life does not adversely affect their right to take part in cultural life' and 'to create conditions conducive to constructive intercultural relationship between individuals and groups based on mutual respect, understanding and tolerance'.[10] It also requires measures from the State where individuals or communities are unable to realise the right for themselves[11] and to ensure appropriate education and public awareness concerning the right, particularly in relation to rural areas, areas of deprivation or in relation to the specific situation of minority groups.[12]

6. Meanwhile communities and cultural organisations are also recognised as having a role to play in promoting cultural rights and cooperating with the State.[13] This is particularly important in a post-conflict or divided society where the challenges of developing constructive intercultural relationships between individuals and groups are more evident. As with other economic, social and cultural rights, each State is required 'to take steps…to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized … by all appropriate means, including the adoption of legislative measures.'[14]

7. The right to access one's own culture, as well as that of others, is emphasised throughout the General Comment, as is both the individual and collective aspect. Key elements include the right to seek and develop cultural knowledge and expressions and to share them with others, the right to take part in creative activity, 'to know and understand his or her own culture and that of others'[15] and the right 'to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights.'[16] Meanwhile the State's 'minimum core obligations' are to take legislative and other necessary measures to guarantee non-discrimination and gender equality in the enjoyment of the right; respect for the right to self-identify and the right to change their choice; to respect and protect the right

[9] *Ibid.*, para. 6.
[10] Ibid., para. 58.
[11] Ibid., para. 54.
[12] Ibid., para. 53.
[13] Ibid., para. 74.
[14] International Covenant on Economic, Social and Cultural Rights 1966, Article 2(1).
[15] General Comment No. 21, op. cit., para. 15(b).
[16] Ibid., para. 15(c).

of everyone to engage in their own cultural rights while respecting human rights; eliminating barriers and obstacles that restrict access to a person's own culture or to other cultures and to allow and encourage the participation of members of different minority groups and communities in the design and implementation of law and policies that affect them.[17]

8. It is clear that the right to participate in cultural life requires that tangible cultural goods and services are *available* to all without discrimination. However, the General Comment makes it clear that intangibles such as 'languages, customs, traditions, beliefs, knowledge and history, as well as values which make up identity and contribute to the cultural diversity of individuals and communities' should also be available to all with particular emphasis placed on 'the productive intercultural kinship that arises where diverse groups, minorities and communities can freely share the same territory'.[18] In relation to *accessibility*, it is important that access should be provided and facilitated, covering individuals and communities in both urban and rural areas and be 'within physical and financial reach'.[19] However, of most significance for post-conflict societies are the requirements of *acceptability*, *adaptability* and *appropriateness*. Measures adopted require formulation and implementation 'in such a way as to be acceptable to the individuals and communities involved. In this regard, consultations should be held with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them'.[20] They should be flexible and relevant.[21] Finally, the General Comment stresses, in relation to appropriateness, that other human rights should be realised in a way that is 'pertinent and suitable to a given cultural modality or context' and 'respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous communities.'[22]

9. To what extent are limits to the exercise of this right permissible, particularly in post-conflict situations? Here the standard qualification applies in that any limitations must be such 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'[23] Furthermore the right should not be interpreted 'as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.'[24] The General Comment makes it clear that limitations might be necessary where there is a likelihood of infringement on other human rights but these 'must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of a general welfare in a democratic society'.[25] The General Comment also makes it clear that certain groups require special protection with regard to the realisation of cultural rights and that the requirement of non-discrimination requires that the 'most disadvantaged and marginalized individuals and groups can and indeed must be protected by the adoption of relatively low-costs targeted programme'.[26] Such groups include women and children, who play a particularly important

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17 *Ibid.*, para. 55.
18 *Ibid.*, para. 16(a).
19 *Ibid.*, para. 16(b).
20 *Ibid.*, para. 16(c).
21 *Ibid.*, para. 16(d).
22 *Ibid.*, para. 16(e).
23 ICESCR, Article 4..
24 *Ibid.*, Article 5.
25 General Comment No. 21, *op. cit.*, para. 15.
26 *Ibid.*, para. 23.

role as 'the bearers and transmitters of cultural values from generation to generation',[27] older persons, persons with disabilities and those living in poverty. Of particular importance in divided societies is the need to ensure the cultural rights and adequate participation in the cultural life of society of minorities and migrants with any programme of integration being based on 'inclusion, participation and non-discrimination, with a view to preserving the distinct character of minority cultures'.[28] This includes the right to hold cultural, artistic and intercultural events[29]

10. This right to participate in cultural life and the arts has also been addressed by the UN Committee on the Rights of the Child in its General Comment No. 17 (2013).[30] General Comment No. 17 recognises the importance of involvement in cultural life in contributing to a child's sense of belonging and in helping them 'discover and forge their own sense of identity and, in turn, contribute to the stimulation and sustainability of cultural life and traditional arts.'[31] Unusually, the General Comment specifically addresses conflict and post-conflict situations, recognising that cultural rights are often given low priority but stressing that they can have an important 'therapeutic and rehabilitative role'[32] and requiring positive measures from the State to encourage creative expression to promote healing in post-conflict situations.33

(b) Right to Enjoy One's Culture – Article 27 ICCPR

11. The right to enjoy one's own culture in Article 27 of the ICCPR is a right conferred on those belonging to ethnic, religious or linguistic minorities, the protection of which 'is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned thus enriching the fabric of society as a whole'.[34] During the drafting of Article 27, it had been noted that a negative formulation seemed to imply 'that the obligations of States would be limited to permitting the free exercise of the rights of minorities.'[35] However, Special Rapporteur Capotorti, in his report on Article 27 was of the view that 'the right granted to members of minority groups to enjoy their own culture would lose much of its meaning if no assistance from the Governments concerned was forthcoming'[36] and therefore concluded that the implementation of the rights in question did in fact call for 'active and sustained intervention by States.'[37]

12. Most of the individual communications considered by the HRC under Article 27 have concerned enjoyment of the right to culture amongst indigenous peoples (e.g. *Lovelace* v *Canada* (1981), *Chief Bernard Ominayak and the Lubicon Lake Band* v *Canada*

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27 *Ibid.*, para. 26.
28 *Ibid.*, para. 33.
29 *Ibid.*, para. 35.
30 Committee on the Rights of the Child: *General Comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts* (Art. 31), UN Doc. CRC/C/GC/17 (17 April 2013).
31 *Ibid.*, para. 11.
32 *Ibid.*, para. 53.
33 *Ibid.*, para. 57(e).
34 Human Rights Committee, *General Comment No. 23: The Rights of Minorities (Art. 27)* (4 August 1994) UN CCPR/C/21/Rev.1/Add. 5, para. 9.
35 Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (UN, New York, 1979) para. 212.
36 *Ibid.*, para 213.
37 *Ibid.*, para 217.

(1990), *Poma Poma* v *Peru* (2009)).[38] However, there are signs that this is changing[39] and cases linking minority languages and the right to culture include Mavlonov and Sa'di v Uzbekistan (2009),[40] which concerned the denial of a re-registration of a newspaper published almost exclusively in the Tajik language that was also distributed to schools. The HRC found a violation of Article 27 with Article 2 (on non-discrimination) stressing that 'education in a minority language is a fundamental part of minority culture' and concluding that 'the use of a minority language press as means of airing issues of significance and importance to the Tajik minority community in Uzbekistan, … is an essential element of the Tajik minority's culture.'[41]

13. The General Comment on Article 27 was adopted in 2004, five years earlier than the General Comment on the Right to Participate in Cultural Life. Whilst the focus is primarily on indigenous peoples, there are a few points that are worth noting – firstly, General Comment 27 clearly identifies the scope of application of Article 27 as covering migrant workers and visitors with no requirement of citizenship, nationality or permanent residence;[42] secondly it recognises that culture manifests itself in different forms and thirdly it emphasises that enjoyment of cultural rights 'may require positive measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.'[43]

*(c) Cultural Rights as Human Rights in Post-Conflict Societies14*1. Most of the recommendations made in relation to cultural rights in post-conflict States are not specifically related to the post-conflict situation. Sometimes this produces surprising results. For example, when the Committee on Economic, Social and Cultural Rights expressed concern about the cultural impact of the Ilisu dam construction project in Turkey, its primary focus was on forced evictions and it did not specifically mention Kurds amongst the people effected.[44] Where a post-conflict situation has been addressed specifically under Article 15, the emphasis is sometimes placed on the development of interculturalism rather than the cultural life of a minority community. For example, in relation to Kosovo, the Committee noted the deep ethnic divide, incidents of inter-ethnic violence and a climate of intolerance, recommending that the UN Interim Administration in Kosovo 'encourage the relevant Kosovo authorities to foster inter-cultural dialogue and tolerance through school education, community level projects and Kosovo-wide campaigns.'[45] The Committee has also noted concerns about the effect of massive migrations of

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[38] *Lovelace v. Canada,* Communication No. 24/1977: Canada, Human Rights Committee CCPR/C/13/D/24/1977 (30 July1981) concerning right of 'Maliseet Indian' to live on a reserve; *Chief Bernard Ominayak and the Lubicon Lake Band* v. *Canada,* Communication No. 167/1984: Canada., Human Rights Committee CCPR/C/38/D/167/1984 (10 May 1990) concerning exploitation of territory and *Poma Poma* v. *Peru,* Communication No 1457/2006: Peru., Human Rights Committee CCPR/C/95/D/1457/2006 (24 April 2009).

[39] For example, *Georgopoulos, Georgpoulou and their seven children v. Greece* Communication No. 1799/2008, Human Rights Committee CCPR/C/99/D/1799/2008 (14 Sept. 2010) (concerning a Roma family).

[40] *Rakhim Mavlonov and Shansiy Sa'di v. Uzbekistan*, Communication 1334/2004: Uzbekistan., CCPR/C/95/D/1334/2004 (29 April 2009).

[41] *Ibid.*, para. 8.7

[42] *op cit*, para. 5.2.

[43] *Ibid.*, para. 7.

[44] CESCR: Turkey, Concluding Observations of the Committee, 12 July 2011, UN Doc. E/C.12/TUR/CO.1, para. 26.

[45] CESCR: Serbia/Kosovo, Concluding Observations of the Committee, 1 December 2008, UN Doc E/C.12/UNK/CO/1, para. 32.

communities and groups from rural to urban areas on the preservation of their cultural heritage.[46] Meanwhile the Human Rights Committee has placed particular emphasis under Article 27 of the ICCPR on the rights of the Roma, where they are significantly represented in post-conflict societies (e.g. Bosnia and Herzegovina, 2012; Serbia, 2011 and Former Yugoslav Republic of Macedonia, 2008).[47] This is sometimes, but not always, in addition to consideration of participation and representation issues affecting other national minorities.[48] Non-recognition of minorities or indigenous peoples is also recognised as a particular problem (e.g. Rwanda and United Republic of Tanzania).[49] However, the focus generally tends to be on the idea of cultural rights as rights of everyone regardless of the group or community to which they belong, rather than specific adaptation to particular post-conflict situations.

1.2 Cultural Rights as an Integral Part of Minority Rights

14. Cultural rights feature prominently in minority rights instruments and therefore have an important role to play both in conflict prevention and in relation to post-conflict situations.[50]

15. There are a number of organisations involved in the developing minority rights framework, although common themes are merging.[51] Key instruments include the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (now OSCE) (the Copenhagen Document) of 29 June 1990, which contains a section (section IV) on questions relating to national minorities, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992 and the Council of Europe's Framework Convention for the Protection of National Minorities 1995. The minority rights framework provides particular insights into the role that cultural rights can play in a post-conflict society because of the history of its development alongside the re-emergence of ethnic tensions in Europe post 1989. This was evident already in the Copenhagen Document paragraph 30, which affirms 'that respect for the rights of persons belonging to national minorities as part of universally recognized human rights is an essential factor for peace, justice, stability and democracy in the participating States.'[52] Many of the provisions in these instruments address education, language and non-discrimination/equality issues as well as issues relating to participation and cross-border contacts. Provisions specifically addressing cultural rights and obligations of the State in

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[46] CESCR: Angola, Concluding Observations of the Committee, 1 December 2008, UN Doc. E/C.12/AGO/CO/3, para. 40.

[47] HRC: Bosnia and Herzegovina, Concluding Observations, 13 November 2012, UN Doc. CCPR/C/BIH/CO/2, para. 21; Serbia, Concluding Observations, 20 May 2011, UN Doc. CCPR/C/SRB/CO/2, para. 22 and Former Yugoslav Republic of Macedonia, Concluding Observations, 17 April 2008, UN Doc. CCPR/C/MKD/CO/2, para. 19.

[48] HRC: Serbia, *op. cit.*, para. 23.

[49] HRC: Rwanda, Concluding Observations, 7 May 2009, UN Doc. CCPR/C/RWA/CO/3, para. 22 and United Republic of Tanzania, *op. cit.*, para. 26.

[50] See statement by Gay McDougal, UN Independent Expert on Minority Issues on the role of minority rights in conflict prevention to the 65th session of the UN General Assembly, 20 October 2010.

[51] These provide the focus of the first three thematic commentaries adopted by the Framework Convention (*See* www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Thematic_Intro_en.asp (*accessed* 16 May 2013) as well as the focus of the first thematic guidelines linked to the work of the HCNM www.osce.org/hcnm/43202 (*accessed* 17 May 2013)).

[52] *See also* Preambles to both the UN Minorities Declaration and the Framework Convention for the Protection of National Minorities.

relation to culture and to the promotion of 'a climate of mutual respect, understanding, co-operation and solidarity'[53] are also included.[54]

16. In regards to limitations, the Framework Convention makes it clear that those exercising any rights flowing from the principles therein must 'respect the national legislation and the rights of others', (Article 20) and that nothing therein 'shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.'

17. Despite the historical context within which these provisions were developed, there are no specific references to post-conflict societies in either the Explanatory Report to the Framework Convention or in the Commentary on the UN Declaration, which was developed much later.[55] This is partly because of their position within the European and international human rights framework with the express recognition of minority rights and minority protection as 'an integral part of the international protection of human rights'.[56] The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as its title suggests, clearly covers a broad range of minority groups and, although the initial intention under the Framework Convention was to focus on the situation of 'national' or 'autochthonous' minorities within States, a number of States and the Framework Convention Advisory Committee have adopted a more inclusive approach in relation to the Framework Convention's scope of application.[57] Meanwhile the OSCE Ljubljana Guidelines on Integration of Diverse Societies adopt an even more inclusive approach, noting that: 'The term "national minority", as used in the Guidelines, refers to a wide range of minority groups, including ethnic, religious, linguistic and cultural communities, regardless of whether these groups are recognized as such by the States where they reside and irrespective of the designation applied to or claimed by them.'[58] The application of minority rights standards is therefore potentially much wider than envisaged during the drafting of these instruments.

18. The Advisory Committee created to monitor States' fulfilment of obligations under the Framework Convention is now well-established in its work.[59] Key themes identified from the Advisory Committee Opinions that are relevant to this report include a focus on representation in decision-making processes, the allocation of funds for cultural activities as well as discrimination and intercultural dialogue. The lack of funding for smaller groups

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[53] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, "Copenhagen Document," 26 January 1990, para. 36.

[54] E.g. paras. 32 and 33 of the Copenhagen Document, Arts. 1 and 2 of the UN Declaration and Arts. 5 and 6 of the Framework Convention.

[55] Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities(4 April 2005) UN Doc. E/CN.4/Sub.2/AC.5/2005/2.

[56] Council of Europe's Framework Convention for the Protection of National Minorities (1995) Article 1.

[57] Elizabeth Craig, *The Framework Convention for the Protection of National Minorities and the Development of a 'Generic' Approach to the Protection of Minority Rights in Europe?, 17* Int'l J. on Minority and Group Rts., 307-325 (2010).

[58] These were adopted by the High Commissioner on National Minorities (November 2012), *available at*www.osce.org/hcnm/96883, (*accessed* 17 May 2013) 4.

[59] *See* Elizabeth Craig, *From security to justice? The development of a more justice-oriented approach to the realisation of European minority rights standards, 30* Netherlands Q. of Hum. Rts. 1, 40-64 (2012) and *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities*, Marc Weller (ed.) (Oxford University Press, 2005) for detailed overview of the approach and significance of particular articles/provisions.

tends to be the focus of particular concern – e.g. concerns expressed in relation to funding of cultural activities for smaller groups such as Vlachs and Serbs in Macedonia (2011)[60] and groups not officially recognised as national minorities in Slovenia (2011).[61] In relation to good practice, the idea of a special fund for financing projects aimed at preserving and developing minority cultures has been welcomed, although delays in implementation have been criticised (Albania, 2011).[62] Meanwhile a range of cultural projects developed by Czech civil society (e.g. Babylon Fest and Colour Planet Festival) were welcomed in relation to the promotion of tolerance and combatting xenophobia in creative ways (Czech Republic, 2007).[63]

1.3 Cultural Rights and the UN Declaration on the Rights of Indigenous Peoples

19. Culture and cultural rights feature even more prominently in the UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007. The Declaration recognises that the right of indigenous peoples to self-determination includes the right to freely pursue their economic, social and cultural development (Article 3) and that indigenous peoples have the right to maintain and strengthen their own cultural institutions while retaining the right to participate fully in the cultural life of the State, if they so choose (Article 5). The right 'to practise and revitalize their cultural traditions and customs…includes the right to maintain, protect and develop the past, present and future manifestations of their cultures' (Article 11(1)). Indigenous cultural diversity should be adequately reflected in the media (Article 16) as well as in education and public information (Article 15). Meanwhile cultural heritage also features prominently, with Article 31 providing that:

'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures…They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.'

20. Following the adoption of the UN Declaration on the Rights of Indigenous Peoples, the UN Committee on the Rights of the Child has drafted a General Comment on the rights of indigenous children under the UNCRC.[64] This recognises the close link between the exercise of cultural rights and the use of traditional territory and resources[65] and notes the particular vulnerability of indigenous children in situations of armed conflict or unrest, particularly when their areas of residence are rich in natural resources or attractive as a base for non-State armed groups.[66] In light of its subsequent observations about the importance of cultural rights for children in post-conflict societies,[67] it is clear that cultural rights issues

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[60] Advisory Committee on the Framework Convention for the Protection of National Minorities 'Third Opinion on the Former Yugoslav Republic of Macedonia' (30 March 2011) ACFC/OP/III(2011)001, para. 17.

[61] Advisory Committee on the Framework Convention for the Protection of National Minorities 'Third Opinion on Slovenia' (31 March 2011) ACFC/OP/III(2011)003, para. 20.

[62] Advisory Committee on the Framework Convention for the Protection of National Minorities 'Third Opinion on Albania' (23 November 2011) ACFC/OP/III(2011)009, paras. 26 & 83.

[63] Advisory Committee on the Framework Convention for the Protection of National Minorities 'Third Opinion on the Czech Republic (1 July 2011) ACFC/OP/III(2011)008, para. 70.

[64] CRC: *General Comment No. 11 Indigenous children and their rights under the Convention*, UN Doc. CRC/C/GC/11 (12 February 2009).

[65] *Ibid.*, para. 16.

[66] *Ibid.*, para. 64.

[67] See Pt I, 1(a) of this report.

need to be addressed from a child-friendly perspective and in a way that takes account both the views of children and their best interests, as required under Articles 12 and 3 UNCRC respectively.

1.4 Giving Effect to Cultural Rights Provisions in Post-Conflict Societies

21. States are given a considerable amount of discretion in how to effectively realise cultural rights in post-conflict societies, and State practice varies considerably. The cultural rights recognised in the International Bill of Rights, in particular the right to participate in cultural life and the right of minorities to enjoy their own culture, are considered to be capable of enforcement by individuals before a judicial or quasi-judicial body.[68] For example, both a right to participate in cultural life and a right similar to that found in Article 27 of the ICCPR were included in the South African Bill of Rights and are subject to the jurisdiction of the courts.[69] However, this is not a requirement under the International Human Rights Covenants.

22. Some States adopt a dualist approach to international law and require the incorporation of relevant provisions before they can be said to become part of national law. For example, the UK Human Rights Act 1998 incorporates ECHR rights into domestic law. Whilst the UK Human Rights Act does not contain a cultural or minority rights provision, the New Zealand Bill of Rights Act 1990 does, as it is aimed at incorporating rights in the ICCPR, rather than the ECHR, into domestic law. Other States adopt a monist approach to international law whereby directly applicable rights provisions automatically become part of national law when they enter into force. This would cover the cultural rights provisions in the International Bill of Rights but not the provisions of the Framework Convention. As explained in the Explanatory Report to the Framework Convention for the Protection of National Minorities (FCPNM)[70]:

- [A] framework Convention … contains mostly programme-type provisions setting out objectives which the Parties undertake to pursue. These provisions, which will not be directly applicable, leave the States concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account.[71]
- The implementation of the principles set out in this framework Convention shall be done through national legislation and appropriate governmental policies …[72]

23. However, in many post-conflict societies specific references are made to minority rights instruments in constitutional bills of rights or in peace agreements. So, for example, both the Dayton Agreement (Bosnia and Herzegovina) and the Belfast Agreement (Northern Ireland) mention the Framework Convention specifically. However, as revealed in the earlier discussion, there is a range of ways to give effect to cultural rights other than through constitutional or legislative recognition.

24. The emphasis on effective participation and intercultural dialogue is common to the Council of Europe, the OSCE and the UN with detailed recommendations and examples of good practice provided in both the Lund Recommendations on the Effective Participation

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[68] *See* Optional Protocol to the ICCPR (1966) and Optional Protocol to the ICESCR (2008).

[69] *See* Elizabeth Craig, *A Right to Cultural Identity in a UK Bill of Rights?* 19 European Public Law 689-714, (2013), at 709-713.

[70] Explanatory Report to the Framework Convention for the Protection of National Minorities (opened for signature 1 February 1995, entered into force 1 February 1998) ETS 157.

[71] *Ibid.*, para 11.

[72] *Ibid.*, para 13.

of Minorities in Public Life[73] and the Framework Convention Advisory Committee's Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs.[74] More recently, the Ljubljana Guidelines on Integration of Diverse Societies aimed to set out recommendations for States, drawing particularly upon the High Commissioner on National Minorities' experiences in post-conflict societies and best international practice. It is therefore significant that they suggest going beyond the recognition and accommodation of 'minority culture, identity and political interests and promoting the participation of all', further elaborating policies and approaches aimed more at promoting integration and cohesion across ethnic divides.[75] Particularly in relation to cultural life, the Ljubljana Guidelines recommend that conditions should be created for effective participation for minorities not just in the cultural life of their own community but also that of wider society.[76]

25. Meanwhile other instruments developed outside the established human rights framework emphasise the responsibility of the State for ensuring that the space exists for cultural expressions to arise, and that the value of the cultural heritage of individuals and groups is also recognised.

II. Rights to Cultural Heritage and Diversity of Cultural Expression: Recent International Trends

26. The last two decades have witnessed an increased recognition within international organisations of the link between cultural expression and cultural heritage and the idea of cultural rights as 'an integral part of human rights.'[77] The position was succinctly summarised by Ms. Farida Shaheed, then the Independent Expert in the field of cultural rights in May 2011:

> *International and regional instruments concerning the preservation/safeguard of cultural heritage do not necessarily have a human rights approach. However, a striking shift has taken place in recent years from the preservation/safeguarding of cultural heritage as such, based on its outstanding value for humanity, to the protection of cultural heritage as being of crucial value for individuals and communities in relation to their own cultural identity. Generally speaking, the more recent the instrument, the stronger the link is with rights of individuals and communities.*[78]

27. The Council of Europe's Charter for Regional or Minority Languages 1992 is an example of the former and the Council of Europe's Framework Convention on the Value of Cultural Heritage for Society 2005 an example of the latter.

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[73] Lund Recommendations on the Effective Participation of Minorities in Public Life, Organization for Security and Co-operation in Europe (1 Sept.1999).

[74] Framework Convention Advisory Committee's Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, Council of Europe, (5 May 2008) ACFC/31DOC(2008)001.

[75] The Ljubljana Guidelines on Integration of Diverse Societies, Organization for Security and Co-operation in Europe (Nov. 2012) 4.

[76] *Ibid.*, rec. 41.

[77] This idea was reaffirmed in UN Human Rights Council Resolution 10/23 establishing a new 'Independent expert in the field of cultural rights', 26 March 2009.

[78] Statement by Ms. Farida Shaheed, the Independent Expert in the field of cultural rights, to the Human Rights Council at its 17th session 31 May 2011.

28. These developments have contributed to a situation where there are increasing references not only to diversity of cultural expression, but also to rights to cultural heritage.[79]

2.1 Rights to Cultural Heritage

29. The Council of Europe's Framework Convention on the Value of Cultural Heritage for Society 2005, a key illustration of one of the more recent instruments referred to by the Independent Expert, explicitly recognises in Article 1(a) that 'rights relating to cultural heritage are inherent in the right to participate in cultural life as defined in the Universal Declaration of Human Rights.' It further recognises 'individual and collective responsibility towards cultural heritage' and 'that the conservation of cultural heritage and its sustainable use have human development and quality of life as their goal' (Article 1(b) and (c)). Article 4 stipulates that the exercise of the right to benefit from the cultural heritage and to contribute to its enrichment 'may be subject only to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others.'

30. The Framework Convention came into force 1 June 2011 and has now been ratified by 15 States Parties. The definitions and principles agreed are particularly relevant to post-conflict situations, in particular Articles 2 and 3 which link cultural heritage to evolving ideas, principles and values.

Article 2 – Definitions

For the purposes of this Convention,

a cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time;

b a heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations.

Article 3 –The common heritage of Europe

The Parties agree to promote an understanding of the common heritage of Europe, which consists of:

a. all forms of cultural heritage in Europe which together constitute a shared source of remembrance, understanding, identity, cohesion and creativity, and

b. the ideals, principles and values, derived from the experience gained through progress and past conflicts, which foster the development of a peaceful and stable society, founded on respect for human rights, democracy and the rule of law.

31. As a framework convention the treaty 'sets out broad principles and areas for action rather than more specific obligations' with State undertakings relating to cultural heritage law and policies (Article 5), cultural heritage and dialogue (Article 7); environment,

[79] Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, Mission to Saint Vincent and the Grenadines (5-9 November 2012), 22 April 2013, A/HRC/23/34/Add.2. *See also* Statement by Farida Shaheed, the Independent Expert in the field of Cultural Rights, to the Human Rights Council at its 17th session, 31 May 2011. Note also that access to cultural heritage was the particular focus of her attention in that year.

heritage and quality of life (Article 8); sustainable use of the cultural heritage (Article 9); cultural heritage and economic activity (Article 10); the organisation of public responsibilities for cultural heritage (Article 11); access to cultural heritage and democratic participation (Article 12); cultural heritage and knowledge (Article 13) and cultural heritage and the information society (Article 14),

2.2 Rights to Cultural Expression and Diversity

32. Key UNESCO instruments addressing rights to cultural expression and diversity include the Universal Declaration on Cultural Diversity 2001 and the UNESCO Convention on the Diversity of Cultural Expressions 2005. The former highlights the importance of cultural human rights in ensuring the flourishing of diversity (Article 5); the need to ensure access to means of expression and dissemination (Article 6); cultural heritage as 'the wellspring of creativity' (Article 7) and the need to recognise cultural goods and services 'as vectors of identity, values and meaning, which must not be treated as mere commodities or consumer goods (Article 8).' The goal of cultural policies should be not just to ensure 'the free circulation of ideas and works,' but also to 'create conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level' (Article 9).

33. It should be noted that objectives agreed by States Parties to the 2005 Convention that are of particular importance for the purpose of this report include: '(b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner; (c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace and (d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples' (Article 1).

2.3 Rights to Cultural Heritage and Expression in Post-Conflict Societies

34. The emphasis on mutual interaction, interculturality and dialogue is of particular importance in post-conflict societies, where there is a need to reconcile the culture of the conflict with a developing culture of peace.80 This is addressed in the Preamble to the UN Declaration on a Culture of Peace (1999), which recognises 'that peace not only is the absence of conflict, but also requires a positive, dynamic participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual understanding and cooperation.' According to Article 8: 'A key role in the promotion of a culture of peace belongs to parents, teachers, politicians, journalists, religious bodies and groups, intellectuals, those engaged in scientific, philosophical and creative and artistic activities, health and humanitarian workers, social workers, managers at various levels as well as to non-governmental organizations.' It does therefore appear to be recognised that the involvement and engagement of a range of actors is required for a lasting culture of peace to develop.

35. The particular challenges presented in post-conflict societies has been recognised also in the recent work of the UN Special Rapporteur in the Field of Cultural Rights. For example, her recent report on the right to freedom of artistic expression and creativity notes that sometimes songs can encourage ethnic hatred and even on occasion 'have an

[80] On intercultural dialogue more generally, see Council of Europe White Paper on Intercultural Dialogue, *available at* www.coe.int/t/dg4/intercultural/source/white%20paper_final_revised_en.pdf (*accessed* 19 June 2013).

amplifying effect on genocide'.[81] The report further recognises that '[a]rtistic expression and creativity may entail the re-appropriation of symbols whether national (flags, national anthems), religious (figures, symbols, venues) or social/economical (a certain brand for example), as part of a response to the narratives promoted by States, religious institutions or economic powers.'[82] This is explored further in the next section of the report, which highlights some of the themes emerging from the relevant literature with a view to identifying some of the opportunities and challenges presented in protecting and promoting cultural rights in post-conflict societies.

III. Historical and Cultural Narratives in Post-Conflict Societies: Developing a More Inclusive Symbolic Landscape

36. It is recognised in the literature that cultural expression and the symbolic landscape in a post-conflict society can help foster peace and reconciliation as well as be a source of ongoing cultural contestation.[83] According to Ross, a symbolic landscape 'communicates social and political meanings through specific public images, physical objects and other expressive representations,'[84] which 'draw meaning from and give meaning to their surroundings.'[85] Whilst a symbolic landscape that excludes groups is perceived as 'an explicit form of denial and assertion of power',[86] a more inclusive symbolic landscape 'is a powerful expression of societal inclusion that communicates a mutuality and shared stake in society.'[87] Policies to transform symbolic landscape in nations that have experienced ethnic conflict therefore aim to correct cultural exclusion and discrimination.[88] The manner by which these policies are developed and carried out is in many ways more important for promoting peace than economic and political policies, although all three of these policies are deeply intertwined.[89]

37. There are various approaches to managing the role of culture in a post-conflict society, and symbolic landscapes can be developed using an integration or accommodation approach, or a combination of the two.[90] It has however been argued that the most successful means of fostering cultural acceptance and interculturalism in the context of

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[81] Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, *The right to freedom of artistic expression and creativity,* UN Doc. A/HRC./23/34 (14 March 2013) para. 33.

[82] *Ibid.*, para. 36, which references Svetlana Mincheva, "Symbols into soldiers: Art, censorship and religion", Background article for the Oslo Conference, p. 2.

[83] Marc Howard Ross, "Cultural Contestation and the Symbolic Landscape: Politics by Other Means," Chapter 1, *Culture and Belonging in Divided Societies: Contestation and Symbolic Landscapes*, MH Ross, ed. (University of Pennsylvania Press 2009) 1-24, 6 and Joanne McEvoy, "Managing Culture in Post-Conflict Societies," in *Contemporary Social Science: Journal of the Academy of Social Sciences*, Vol. 6(1), 2011, 55.

[84] Ross (2009) *op. cit.* 6.

[85] Derek H. Alderman and Joshua F.J. Inwood, "Landscapes of Memory and Socially Just Futures," Chapter 18, *The Wiley-Blackwell Companion to Cultural Geography*, Nuala C. Johnson, Richard H. Schein and Jamie Winders, eds.(Wiley-Blackwell 2013) 188.

[86] Ross (2009) *op. cit.*, 7.

[87] *Ibid.*

[88] Frances Stewart, *Policies Toward Horizontal Inequalities in Post-Conflict Reconstruction,* Centre for Research on Inequality, Human Security and Ethnicity, Working Paper No. 7, University of Oxford, 2005, 21. (*available at* www3.qeh.ox.ac.uk/pdf/crisewps/workingpaper7.pdf (*accessed* 29 October 2013).

[89] Ibid., p. 21..

[90] See McEvoy, *op. cit.* and also Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008).

reconciliation are those that seek to incorporate an inclusive accommodationist approach to include public recognition of diverse cultures.[91] An integration framework strives to develop a common public identity that does not find it entirely necessary to incorporate ethnic differences into the political structures of a society.[92] In this approach, the framework is optimistic about an accepted common identity, where cultures share a universal existence.[93] The accommodation framework understands that in many cases ethnic, cultural, linguistic and national identities are enduring, and not easily transformed.[94] This approach aims to adopt an inclusive strategy towards reconciliation where cultural identity is promoted in public and private spheres, whereas the integration framework runs the risk of being exclusive in nature and creating cultural marginalisation. An inclusive accommodationist strategy seeks to recognize the ethno-cultural diversity of a society, while also aiming to reduce the inequities cultural groups may face when attempting to access their cultural rights.[95]

38. The role of the State in the mobilisation of culture and the realisation of cultural rights in the public sphere would therefore appear particularly significant. The evidence presented in this report illustrates that cultural rights can serve as a divisive or reconciling mechanism according to cultural values, ideals and symbols mobilised through popular discourse. However, it also suggests that ongoing cultural contestation is inevitable and needs to be managed rather than eradicated. This section of the report aims to provide an insight into some of the challenges and opportunities that are encountered in transforming the symbolic landscape within societies that have experienced conflict. It does so by drawing upon historical and cultural narratives that accompany the protection and fulfilment of cultural rights, especially in regards to the inclusivity and accessibility of cultural goods, in post-conflict societies.

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[91] McEvoy, *op. cit.*

[92] Sujit Choudry, "Bridging comparative politics and comparative constitutional law: Constitutional design in divided societies," Chapter 1, *Constitutional Design for Divided Societies*, S. Choudry, ed.(Oxford University Press 2008) 3-40, 27.

[93] Ibid.

[94] J. McGarry, B. O'Leary and R. Simeon, "Integration or accommodation? The enduring debate in conflict regulation," Chapter 2, *Constitutional Design for Divided Societies*, S. Choudry, ed.(Oxford University Press 2008) 41-88, 52-53.

[95] *See* Cheryl de la Rey, "Reconciliation in Divided Societies," Chapter 21, *Peace, Conflict, and Violence: Peace Psychology for the 21st Century*, D.J. Christie, R.V. Wagner & D.A. Winter, eds.(I A Books 2001) 20.)

3.1 The Role of Cultural Symbols

39. Cultural symbols can take many forms: a flag, monument, museum, ceremony, memorial or even an emblem on a national sport's team jersey. Cultural symbols can be utilized to shift collective identities from those that are defensive, exclusive and sometimes divisive, to identities that are inclusive and empowering.[96] The use of more inclusive public symbols draws former opponents into new relationships, with a greater possibility to develop narratives that incorporate cultural differences, social practices, languages and norms and values.[97] Public symbols that are exclusive, meaning their intention is to recognize the narrative, culture or memory of a particular group or groups, have a much greater risk of shifting from a symbol of remembrance to one of cultural contestation, where different groups see the symbol as a means for expressing differences.[98] Monuments, memorials and other public cultural symbols have the "tendency to reflect and reinforce existing societal structures and notions of community, and to perpetuate commonly held images and stereotypes."[99] This means that developing new cultural symbols, which shift identities from defensive to empowered, aides in establishing a new notion of community, and helps to eradicate polarizing images and stereotypes that fuel discrimination. Cultural symbols can be used as tools to formulate a symbolic landscape that promotes unified and empowered collective identities.

40. Cultural identity is intrinsically linked to the historical narratives and memories of a community. In a post-conflict context the question of reconfiguring cultural identity, for example through altering or eliminating a cultural symbol, thus entering a process of cultural reconstruction with reconciliatory cultural identifications, in an effort to promote peace is a challenge. Often symbols are perceived as emblems of subordination, discrimination, segregation and violence by marginalized or minority groups during a conflict. However, when a group or groups' cultural identity is linked to the symbol as a means of cultural expression, eliminating the symbol after a conflict is akin to erasing a part of that group's cultural identity and the group's historical narrative. Conversely, a post-conflict symbol that is intentionally used to demarcate differences among groups, incite ethnic hatred, or reinforce the idea of one group as victor and the other as victim, brings issues of power and politics into play.[100] The challenge therefore is to design and develop more inclusive symbols that promote the common heritage and similarities of groups.

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[96] Lee Smithey, "Conflict, Transformation, Cultural Innovation, and Loyalist Identity in Northern Ireland," Chapter 5, *Culture and Belonging in Divided Societies: Contestation and Symbolic Landscapes*, Marc Howard Ross, ed.(University of Pennsylvania Press 2009) 85-106.

[97] Ross (2009) *op. cit*., 2.

[98] E.g. Dominic Bryan and Clifford Stevenson, "Flagging Peace: Struggles over Symbolic Landscape in the New Northern Ireland," Chapter 4, *Culture and Belonging in Divided Societies: Contestation and Symbolic Landscapes*, MH Ross, ed.(University of Pennsylvania Press 2009) 68-84, 73 on flags and emblems in Northern Ireland.

[99] Sabine Marschall, "Symbols of Reconciliation or Instruments of Division? A Critical look at New Monuments in South Africa," Chapter 8, *Culture and Belonging in Divided Societies: Contestation and Symbolic Landscapes*, Marc Howard Ross, ed.(University of Pennsylvania Press 2009) 151-175, 166.

[100] Judy Barsalou and Victoria Baxter, "The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice," United States Institute of Peace (January 2007) 4.

3.2 Participation

41. Post-conflict reconciliation projects that neglect to incorporate the effected community and cultural gatekeepers into the process of developing a transformed symbolic landscape have the potential to build resentment, instead of peace. This is because the members of a post-conflict society are the owners of the history, narratives, and memories of the conflict, and are therefore the best sources for understanding not only the conflict itself, but also what the society needs to heal itself. When such initiatives are developed in a "top-down" fashion there may be a disconnect between the project's original intention, and how it translates to local communities and within group identities.[101] Truth and reconciliation commissions and transitional justice projects have become increasingly aware of the necessity of including members of the community in the design of post-conflict projects that emphasize the recognition of all cultural identities.[102] Participation on behalf of the community is a fundamental element in the realisation of a symbolic landscape that is perceived as inclusive and relevant.

42. An example of good practice in this regard was the effort made by the Truth and Reconciliation Commission in Peru to reach out to the Quechua peoples. The Commission made an agreement with a well-known theatre group to go into the communities and use performance art to explain what the Commission was, how it worked, and its overall objectives to the people. [103] As part of its agreement with the Peruvian Truth and Reconciliation Commission, the Yuyachkani Theatre group's role was to serve as a mediator between the Commission and the indigenous communities, and as a channel to the Commission's public hearings. By using cultural expression to relate to the indigenous communities, the group was able to add personal experiences to a collective healing process that was inclusive of minority groups in Peru.[104] This collaboration between the Peruvian Truth and Reconciliation Commission and the Yuyachkani Theatre Group was effective for several reasons. First, the Yuyachkani Theatre Group was a social and cultural institution in Peru during the conflict, and had not simply been manufactured post-conflict by the Commission.[105] Second, the group had concerned itself with indigenous community issues long before its collaboration with the Commission. [106] Finally, the Commission's effort to disseminate a reconciliation message to marginalized communities was successful because it worked alongside a local cultural institution that had already been widely accepted by the Peruvian community. In this case, the Yuyachkani Theatre Group used performance arts and culture to bring a marginalized community into the post-conflict reconciliation process, and ultimately made it possible for the Quechua peoples' cultural identity to participate in the historical and cultural narrative of the conflict. This example highlights the importance of ensuring the inclusion and participation of existing cultural gate-keepers in new cultural and reconciliation initiatives.

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101 Marschall, *op. cit.*, 166.

102 E.g. Barsalou and Baxter, *op. cit.*, 13 in relation to South Africa. .

103 Francine Mary A'Ness, *Resisting Amnesia: Yuyachkani, Performance, and the Postwar Reconstruction of Peru*, 56 Theatre Journal 3, 395, 399 (2004),. *See also* Yuyachkani Theatre Group: Prior to working with the Commission, the group founded, " Teatro por lavida" which aimed to raise awareness about human rights abuses in Latin America, *See* http://hemisphericinstitute.org/cuaderno/yuyachkani/index.html (*accessed* 31 March 2013).

104 *Ibid.*, 397-399.

105 The Yuyachkani Theatre Group has been performing since 1971. *See* http://hemisphericinstitute.org/cuaderno/yuyachkani/group.html (*accessed* 31 March 2013).

106 A'Ness, *op. cit.* 399 and 401.

43. As these examples reveal, the relationship between cultural identity and the right to express and access culture is very much indivisible. Symbols are not only powerful, but they also represent how power is used within a society. Reconciliation processes that exist within a power struggle that is enforced by contested cultural symbols, will have great difficulty in achieving success without incorporating public participation, and also developing benefits for the community as a whole.

3.3 Improvement of Lives

44. In transforming the symbolic landscape of a society, cultural symbols such as "museums and monuments need to be linked to processes that seek to improve the daily socio-economic conditions" of members of the community.[107] In some cases, members of groups that experienced the greatest amount of hardship during a conflict do not appear to receive much benefit from the transformed post-conflict symbolic landscape with new cultural contestation sometimes emerging.

45. One example that has been cited in the literature relates to the establishment of a set of city development plans, called Skopje 2014, by the Macedonian government.[108] The Skopje 14 plan envisaged the building of 17 statues and 15 buildings in the city centre, including a statue of Alexander the Great, and was perceived by supporters of the project to be beneficial in consolidating Macedonia's national identity.[109] However, some ethnic Albanians perceived Skopje 2014 'to be a one-sided project with little to offer their community' and it has ultimately become a symbol of the identity crisis that faces the post-conflict nation.[110] The Macedonian government's "top-down" approach to developing a transformative symbolic landscape did not have the desired effect because it failed to equally benefit each of the groups that were party to the conflict. In essence, Skopje 14 became a source of cultural contestation, instead of cultural reconciliation.

46. Cultural tourism is also a factor to consider in how symbolic landscapes affect a post-conflict society.[111] The Kliptown Memorial in South Africa is a grand monument located in a very poor area where members of the community continue to struggle to survive. The memorial has become a symbol of dissatisfaction for the surrounding community because the revenue it generates as a tourist attraction is not being put back into the community, and therefore does not benefit the people that were most affected by the conflict.[112] In this case, the revenue's beneficiary is the cause of contention, because the people perceive the government as capitalising on the post-conflict symbolic landscape.

47. It would appear that the most effective way of ensuring that reconciliation-based monuments, memorials and museums and other cultural initiatives benefit the communities they represent is to involve each of the communities directly in the project's design and manufacture. The beneficiaries of a post-conflict society's symbolic landscape are directly related to the incorporation and participation of members from all cultural identities within the society in order to ensure the communities are represented equally, and also receive any

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[107] Ereshnee Naidu, "Symbolic Reparations: A fractured opportunity," Research report written for the Centre for the Study of Violence and Reconciliation (2004) 3.

[108] McEvoy, *op. cit.* 66.

[109] *Ibid. See* BalkanInsight.com (June 2010) "Critics lash 'dated' aesthetics of Skopje 14," (*Available at* www.balkaninsight.com/en/article/critics-lash-dated-aesthetics-of-skopje-2-an4 (*accessed* 31 March 2013))

[110] *Ibid.*, 66-67.

[111] "Cultural tourism: to create a discerning type of tourism that takes account of other people's cultures," UNESCO, "Culture," *available at* www.unesco.org/new/en/culture/themes/culture-and-development/cultural-tourism/ (*accessed* 31 March 2013).

[112] Barsalou and Baxter, *op. cit.*, 9.

monetary benefits that may arise from cultural tourism. The idea therefore is to foster inclusive cultural reconstruction through equal representation of communities in the process of decision-making and in the design of new cultural policy, initiatives and symbols.

3.4 Further Challenges for the Right to Culture in Post-Conflict Societies

48. The challenges that face societies in post-conflict reconciliation processes are centred around issues of cultural inclusivity, community participation and community benefits. Each of these aspects, when excluded from the society's symbolic landscape, has the capacity to compromise peace-building efforts, and ultimately can become a source of contestation rather than reconciliation. The challenge of developing a symbolic landscape that is entirely culturally inclusive is inherently connected to inclusive community participation in the creation of the landscape. Communities that exist outside of the dominant parties to the conflict are those that experience the most marginalization in the development of a post-conflict symbolic landscape. Identifying these groups and encouraging their participation allows their voices to be heard and to impact the development and design of the symbolic landscape in a way that is beneficial to the whole community. As cultural tourism increasingly plays a role in the construction of a society's post-conflict symbolic landscape, it is crucial that the effected communities participate in cultural projects rather than adopting a primarily top-down approach, which can be perceived by communities as potentially undermining their own cultural identity and historical narratives. This is demonstrated further in the next section, which focuses specifically on the designation of Derry/Londonderry as UK City of Culture 2013. This case-study reveals that the challenges posed by cultural rights in post-conflict societies can be found not just in efforts where exclusive initiatives lead to cultural contestation[113] but also at initiatives aimed at developing a more inclusive approach.

IV. Case-Study on Cultural Rights: The Derry/Londonderry City of Culture Initiative

4.1 Introduction

49. The designation of Derry/Londonderry as UK City of Culture 2013 is used here as a case-study to explore the opportunities and challenges presented by such a large-scale cultural initiative to the right to culture in a post-conflict society. The importance of the right to cultural expression (and to cultural heritage) of communities that have been involved in ethnic conflict through the effective implementation to the right to culture is central to the analysis that follows.

[113] E.g. Bryan and Stevenson in Ross 2009, *op. cit.*

50. Cultural contestation in Northern Ireland has already been the focus of considerable attention in the literature.[114] This recognises both the complexity of the local symbolic landscape[115] and the role of the peace process in intensifying 'symbolic contestation' as 'a principal means for the two sides to express their differences.'[116]

51. It is therefore perhaps unsurprising that progress on cultural rights has been slow, particularly in the legislative arena, with ongoing and unresolved debates over an Irish Language Act, a Bill of Rights which could potentially include cultural rights provisions (including the rights to cultural expression and to cultural heritage)[117] and over flags and parades, key markers of the symbolic landscape. A prominent example of this is the controversy that arose over the decision of Belfast City Council in December 2012 to fly the Union flag on certain designated days, which followed earlier legislative intervention applying to the devolved government and not to local council buildings.[118] There are of course numerous other examples with the Human Rights Act 1998, which incorporates the civil and political rights provisions in the ECHR into domestic law, on occasion drawing the courts as well as the legislature into such contestations. However, more inclusive symbols and shared spaces are also emerging,[119] with one prominent example being the new peace bridge in Derry/Londonderry linking the predominantly Catholic Cityside with the predominantly Protestant Waterside,[120] another of course being the City of Culture initiative itself.

4.2 Approach to the Research

52. Through the collection of qualitative data in the first quarter of the UK City of Culture 2013 the aim of this research was to explore the opportunities and challenges the designation of Derry/Londonderry as a post-conflict society has presented in relation to the realisation of cultural rights. Those interviewed during the course of the research included local artists, community representatives and cultural leaders as well as policy-makers associated with the Derry/Londonderry UK City of Culture 2013 initiative. The aim was not to provide a comprehensive evaluation of the City of Culture Initiative, but rather to provide a snapshot of opportunities and challenges identified at a very early stage in the process by a range of different cultural stakeholders. For this reason quotes from local artists and cultural leaders have been anonymised, unless identification is considered necessary for further contextualisation of the point being made. This part of the report was discussed during the meeting of experts at the symposium on Cultural Rights in Post-Conflict Societies, which was organised by the Northern Ireland Human Rights Commission and scheduled as part of the City of Culture programme in July. This event

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114 For example, Joanne McEvoy *op. cit., and* Ross (ed.) (2009) *Culture and Belonging in Divided Societies* Chs. 4 and 5, *op. cit.* and Ross (2007) *Culture Contestation in Ethnic Conflict* Ch. 4, *op. cit. op*

115 Bryan and Stevenson in Ross (2009) *op. cit.*, 69.

116 *Ibid.*, 73.

117 See NIHRC, A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland, 10 December 2008, available at http://www.nihrc.org/documents/bill%20of%20rights/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf (*accessed* 29 October 2013). For debates surrounding the inclusion of such rights in any future Northern Ireland or UK Bill of Rights, *see* Elizabeth Craig, *The Framework Convention for the Protection of National Minorities and the Northern Ireland Bill of Rights Process*, 60 Northern Ireland Legal Q. 201-11 (2009) and Elizabeth Craig, *A Right to Cultural Identity in a UK Bill of Rights?* 19 Eur. Pub. L., 689-714 (2013).

118 The Flags (Northern Ireland) Order 2000. On the flags issue generally, see Bryan and Stevenson in Ross (2009) *op. cit.*

119 Bryan and Stevenson in Ross (2009) *op. cit.*, 77-82.

120 On some of the cultural contestations that have arisen in Derry/Londonderry over the years and subsequent 'ritual definition,' *see* Ross (2007), *op. cit.*, 117-121.

can be linked to the goal of 'purposeful inquiry' and the discussion that took place informed both this section of the report as well as the subsequent recommendations.

4.3 The City of Culture Bid

53. The role of central, devolved and local government in the City of Culture bid is of course pivotal from an international human rights law perspective. The initiative for the Derry/Londonderry bid came from Derry City Council, the ILEX Urban Regeneration Company 'tasked with the promotion of the physical, economic and social regeneration' of the city and the Northern Ireland Strategic Investment Board.[121] It was recognised that 2013 was an important year for the city, with the marking of the 400th anniversary of the building of the city's historic walls. The launch of the UK City of Culture initiative therefore provided an ideal opportunity for a city with such a rich history, with the city's bid focusing in particular on the dual strands of 'joyous celebration' and 'purposeful inquiry'. Derry City Council is both the Licence Holder of the title and parent body of the Culture Company 2013 Ltd, which is an independent company (limited by guarantee) given the task of developing and delivering the cultural programme[122] and whose offices are symbolically based at the former Ebrington military barracks at the end of the new peace bridge. The initiative has involved significant revenue and capital investment in the city with key funders including the Department of Social Development (NI), the Department of Culture, Arts and Leisure (NI), ILEX, the local authority and other sources of public funding as well as private sponsorship and ticket sales.[123]

54. Whilst the UK City of Culture designation is administered centrally by the Department for Culture, Media and Sport, it was clear from the outset the successful bid would not secure central government funding. The link to regeneration and urban strategy planning was therefore emphasised from the beginning.[124] The vision was accordingly to develop a cultural programme which would connect local communities and be accessible to everyone and to deliver 'a significant transformational series of step changes' in local economic prosperity as well as equality, good relations and social cohesion.[125]

55. It is however the cultural aspect that is key for the purposes of this report, which considers first the opportunities and then the challenges to the realisation of cultural rights presented by the City of Culture initiative. It is clear that a post-conflict setting provides specific challenges in the application of cultural rights in ensuring acceptability in relation to the right to culture for different communities in a way that does not create further cultural insecurity and contestation. This was noted in an interview with officials from the Department of Culture, Arts and Leisure, who emphasised the importance of 'making sure everyone has their story told, and making sure everyone has their story told in a way that they are happy with, and that people don't feel any violence is done when their story is

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[121] Derry-Londonderry City of Culture 2013, 2nd ed., Culture Company 2-13, p. 122, *available at www.cityofculture2013.com/2013-programme* (*accessed* 22 June 2013).

[122] *See* Culture Company 2013, *available at* www.cityofculture2013.com/background/culture-company-2013/ (*accessed* 22 June 2013).

[123] *See* Derry-Londonderry 'City of Culture' bid document 'Our Bid,' *op. cit.* and programme, *op. cit.*, 123.

[124] This was indeed one of the requirements in the bidding guidelines – *See* Jonathan Vickery 'Reconsidering the Cultural City' in *It's Not the Winning: Reconsidering the Cultural City*, A Report on the Cultural Cities Research Network 2011-12, Kerry Wilson and David O'Brien, eds. (July 2012) 32-35.

[125] Other areas identified included 'the City's cultural offering; the opportunities available to our citizens and give expression to their talent; and the ability of our communities to creatively connect globally. ('Our Bid', *op. cit.*, 4).

being told', whilst also 'making sure that everyone has access to culture ...'[126] As was further indicated in this interview, not only is the expectation now that culture, arts and leisure will be used 'to combat poverty, fight social exclusion and help integrate people into our society more,' but also that there is a need 'to use culture, arts and leisure as ways of understanding who we are and telling [different] stories and learning but in a way almost to make sure it doesn't happen again ... to try to help us to move to a post-conflict situation.'

4.4 Realising the Right to Participate in Cultural Life: The Opportunities Presented by the City of Culture Programme

56. It will be recalled that the right to participate in cultural life requires availability, accessibility, acceptability and adaptability. Although only three months into the programme at the time of the initial writing of this report, it was clear that the slogan 'Culture for All' has been interpreted in a way that would appear to meet the requirements of availability and accessibility, providing a cultural space for all regardless of individual or group background and identity. In terms of accessibility, a clear commitment was made in the bid that 70% of cultural activity would be free at the point of delivery with another key component being the 'edge to centre' approach.[127] The aim of this approach was 'to bring those on the edge of the city's cultural life to the heart of it.'[128] The commitment on pricing was therefore always going to have a significant impact in relation to making culture accessible to different socio-economic groups with the 'edge to centre' approach ensuring accessibility to those living on the geographical edge and allowing cultural expression amongst individuals and groups in areas of high deprivation. According to an officer of Derry City Council, the intention behind this approach was 'to make sure that cultural activity went into neighbourhoods' with a component of the budget allocated to the neighbourhoods to design their own cultural programme. Meanwhile the City of Culture programme facilitates acceptability and adaptability by making grants available to individuals, voluntary/community organisations and statutory organisations for their own events and initiatives.[129] Many individual organisations representing local culture and heritage have benefitted from this, although given the timeframe in question it was perhaps inevitable that issues relating to the distribution of funding and the processing of applications would arise.

57. The range and quality of events within the programme is impressive and, on the face of it the programme does indeed appear to have something for everyone. In terms of the groups recognised as requiring special protection by the International Committee on Economic, Social and Cultural Rights, it was the emphasis on children and young people that was particularly evident from the interviews conducted during the course of the research with a number of references made to educational initiatives and to the Children's Music Promise Programme. There has also been considerable focus on higher-end cultural activity, which ensures the accessibility and availability of cultural excellence. There are two lead senior programmers within the Culture Company 2013, as described by the Chief Executive of the Culture Company: one of the programmers was to 'bring the major national, international projects... wow factor stuff' (eg . Hofesh Shechter, the Turner Prize,

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[126] For an earlier manifestation of this, see documents preceding the adoption of the Museums Policy, *available at* www.dcalni.gov.uk/index/museums-r08-2/museums-r08.htm (22 June 2013).

[127] 'Our Bid,' *op. cit.*

[128] 2013 Communities Programme: Consulting Local Communities,' *available at* www.shiftyparadigms.org/images/Misguided_Loyalties/Engaging_Communities_Strategy_2013.doc (*accessed* 22 June 2013).

[129] *See* City of Culture Funding Opportunities, *available at* www.cityofculture2013.com/funding-opportunities/ (*accessed* 22 June 2013).

the National Ballet, the London Symphony Orchestra, Haris Pašović), the other was appointed as head of the Education and Communities programme with a concerted effort to ensure that the national and international projects were also used to connect with local people and communities.[130] Particular emphasis has been placed in particular on the development of local and emerging cultural leaders, particular amongst the younger generation.

58. In post-conflict societies there are particular challenges in ensuring acceptability in relation to cultural rights, as will be discussed later in this report. The inclusion in the programme of events focused specifically on the city's history and the culture of both main communities was therefore crucial. Such events include the Plantation: The Irish and Ulster Scots Experience project, the Nelson Drive Estate 50th Anniversary initiative aimed at 'raising awareness of Protestant culture and traditions' and Scéal na Gaelige: The Story of Irish, intended to tell the story of Irish and of its speakers in the City. Meanwhile, the Peace Process project and Picturing Derry, a photographic exhibition relating to the conflict, are examples of initiatives that acknowledge the role of the conflict and of the peace process in the city's history.[131] Other events and initiatives referred to in the interviews conducted included the Return of Colmcille 'The Peace Maker' pageant,[132] the Ebrington Tattoo[133] and debates around purposeful enquiry being led by the Culture Company and the Holywell trust.[134] At the time of the conducting of this research, it was too early to tell how successful the translation of the ideal of purposive inquiry would be in practice, although there were some promising signs[135] and of course this report itself forms part of this strand. It is clear nonetheless that such initiatives can be closely linked to the goal of promoting mutual understanding, dialogue and acceptance between groups as required by international human rights standards and have an important role to play.

4.5 Challenges to the Realisation of Cultural Rights

(a) Engaging Local Cultural Leaders and Gatekeepers

59. A lot of work has been undertaken within the context of the City of Culture initiative to ensure the engagement and involvement of local cultural leaders and gatekeepers with some cultural communities embracing the opportunity to showcase their culture.[136] Despite such efforts, and the opportunities for local cultural leaders and community representatives to apply for funding to support their own cultural events and initiatives, a number of interviewees reported a sense of disengagement from the process. The problem appeared to be in early perceptions of the type of culture represented by the event, illustrating the

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130 The example given in that interview was the Hofesh Schecter Theatre Company working with 30 young musicians and 150 young dancers from across the city.

131 For details of these and other events, *see* the City of Culture programme, *op. cit.*

132 The Return of Colmcille "The Peace Maker," *available at* www.cityofculture2013.com/event/the-return-of-colm-cille/ (*accessed* 22 June 2013). According to Mr Ó hOisín, MLA: 'We have identified shared and Christian history, such as the legacy of Colmcille, and an appreciation of a shared tradition, not only locally, but along the north-west and north coasts of Ireland, the west coast of Scotland and elsewhere.' (Northern Ireland Assembly Debates, Hansard, Vol 84, No 5, 29 April 2013) 3.

133 *See* The Walled City Tattoo, *available at* www.cityofculture2013.com/event/the-walled-city-tattoo/ (*accessed* 22 June 2013)

134 *See* Hollywell Trust, *available at* www.holywelltrust.com/ (*accessed* 22 June 2013).

135 For an early discussion of this, see debate on *Private Members' Business, Londonderry and the North-west 1613-2013*, Northern Ireland Assembly Debates, Hansard, Vol. 84, No 5, 29 April 2013, 1-15 .

136 *See*'2013 Communities Programme: Consulting Local Communities,'*op. cit.*

particular challenges of establishing any new cultural initiative in a post-conflict setting where local cultural leaders and artists consider their own forms of cultural expression or production and associated cultural rights to be at risk or under threat.[137] This reflected in the following assessment of the City of Culture by one of the interviewees: 'it's almost as if we'd been given a blank canvas, but the City of Culture is not about blank canvases… like I said. The City of Culture is reflective of what already exists and opening that up to the world. Not bringing in the circus for a period of time and then moving it on to somewhere else.'

60. Of course one of the reasons for this perception was that the City of Culture initiative is regarded by many as an opportunity to move beyond the dominant narratives and divisions of the past, as reflected in the following quote from the Chief Executive of the Culture Company:

> *You know, every Protestant in this city is not sitting waiting saying where are the pipes and drums? And where's the Ulster Scots and every Catholic or Nationalist is not sitting waiting saying is there Fleadh in it? Is there Irish language in it? It's just trying to lift people out of those standard stereotypes and create a programme that has just good things and if it's something that's in the Irish language or to do with pipes and drums and it's quality, and it's exceptional for the year then it's in our programme.*

61. However, what the interviews conducted revealed is that for some this is indeed the reality. This suggests that more proactive efforts may be required to reach out to those cultural leaders and gate-keepers who consider that their own cultural heritage and forms of cultural expression are perhaps threatened. The engagement of such individuals would appear to be particularly important in post-conflict societies where cultural contestation can quickly lead to a deterioration of relations between groups and an increase in tensions.

62. It was noted above that one of the additional challenges to the realisation of the right to culture in post-conflict societies relates to the position of 'the Other,' i.e. those who do not belong to one of the main communities associated with the conflict. This was also reinforced during the course of the research. As articulated by one of those interviewed, 'in terms of cultural rights, everything here has been bogged down in the mainstream conflict.' A particular problem for such communities in Northern Ireland is the issue of representation, particularly given a long history of marginalisation, as revealed in the following quote from the same representative: 'No, absolutely there are loads communities which are not represented in an organised way.' There is therefore a clear need to help contribute to capacity building so groups can represent themselves in a more meaningful and effective way.

63. Whilst central and local government support is clearly vital in ensuring the legacy of City of Culture 2013, it is submitted that local cultural leaders and gate-keepers also have important roles to play. It is central to highlight here that cultural leaders and gatekeepers can have significant influence over their communities and that adequate local community representation is therefore key. It is clear from the following quote from the Chief Executive of the Culture Company that one of the aspects of the legacy will be the emergence of new cultural leaders: 'One of the biggest legacies is going to be a group of people who have had the most incredible experience, a most challenging experience, but the kind of cultural leadership that that will leave here is an enormous legacy.' However, it is

[137] Some interviewees noted that they had not been asked to be involved in the initiative, and one also mentioned in this regard the list of cultural champions on the City of Culture website, www.cityofculture2013.com/champions/ (*accessed* 22 June 2013).

crucial in a post-conflict society that existing cultural leaders are not thereby marginalised in the process, and that there is also space for the development of cultural leadership within those communities that have traditionally lacked representation or where cultural gatekeepers have tended to dominate at the expense of local communities.

(b) The (Re)emergence of Underlying Cultural Contestation

64. The potential marginalisation or exclusion of local cultural leaders is not however the only challenge to the realisation of cultural rights in post-conflict societies, so too is the potential for divisive cultural elements to arise. As revealed by tensions that have arisen in relation to the title of the designation itself and to specific events, it is clear that the launch of any new cultural platform in a post-conflict society inevitably allows space for underlying cultural contestations intrinsically linked to the conflict to re-emerge.[138] This is supported by the following quote from one of the interviewees: '[Y]ou cannot take the politics out of this. This is my point. The politics cannot be taken out of this, even though it is being presented as culture and a cultural event and so on and so forth, you cannot remove the politics.'

65. The tensions associated with the naming of the city as either Derry or Londonderry and with the identification of the city as either an Irish or British city have been well-documented.[139] It is not therefore surprising that the decision to make a bid for the UK City of Culture title, and the subsequent dropping of the UK from some of the publicity materials, led to further contestation. This was repeatedly mentioned in interviews with local cultural stakeholders with the challenge presented clearly articulated in the following quote: 'Yeah, they've airbrushed out the UK, which has upset some of the Unionist community, actually upset all of the Unionist community. But, the fact is they have airbrushed it out to make it more palatable for the Catholic Nationalist community.' A similar point was raised in another interview: 'Well, that's been one of the ways to drag Nationalists into it. And that's why Sinn Féin are more comfortable about it when they're talking about the City of Culture rather than the UK City of Culture. That hasn't gone unnoticed by the Protestant community. They are very clear that it is the UK City of Culture. But, they're feeling excluded from it now, because the UK has been left out of it, has been removed from it. '

66. The bringing of the All Ireland Fleadh Cheoil na hÉireann [140] to the city also appears to have caused some concern amongst the Protestant or Unionist community, both in relation to the presentation of the city as an 'Irish city' and in relation to funding. This is revealed in the following quote from a representative of the Apprentice Boys, a long established cultural organisation in the city associated in particular with Protestant or British culture.[141] 'You can argue about the Fleadh in terms of traditional music etc., … but the significant thing is that the Fleadh has never been here. Whereas from our point of view we are here, we love, breathe it…. 365 days a year, every year. Whereas this is imported for the UK City of Culture, what legacy it leaves I don't know.' This concern was reinforced by another of our interviewees who revealed his predication, that 'it will be a big cultural Nationalist, Republican, Catholic event rather than an inclusive event. There'll be musicians coming in from international, there'll be Americans, there'll be Europeans, there'll be Germans, I'd say there'll be French, there'll be a lot of people coming from all

[138] *See also* McEvoy, *op. cit.*, in relation to the Former Yugoslav Republic of Macedonia.
[139] Ross (2007) *op. cit.*, 117-121.
[140] An annual celebration of Irish culture and music, *see* www.fleadhcheoil.ie (*accessed* 22 June 2013).
[141] *See* Apprentice Boys of Derry, *available at* www.apprenticeboys.co.uk (*accessed* 22 June 2013).

over the world for it… The Protestant community will feel excluded again…if it's going to be divisive, that's the one that will be most divisive.'

67. What this and other examples[142] reveal is the inevitability that such cultural contestation will arise and that there is the need for sufficient space to be allocated to allow for discussion and dialogue. It appears that this was recognised also by those involved in initiating the bid, as indicated by an officer of Derry City Council: 'And you know there was this debate; were we the UK City of Culture, were we the City of Culture, were we Derry, were we Londonderry, were we Doire? So that debate has been very healthy. It has been played out a lot in the media, and the media has been having conversations in relation to it. It's been happening within communities, people having conversations.' This also involves to some extent reconciling with the past and developing a new story or narrative. The key point to be made here is that such contestation is to be expected and that the ensuing narrative, dialogue and debate can be a useful part of the reconciliation process.

4.6 Developing a New Story

> *So we said rather than focus on one identity and being recognised for a green or an orange bid this was what culture meant to an individual so we said whenever we refer to being creative and ambitious and being connected that was about individuals, this was their chance to unleash a completely new transformation of themselves, of the city and how then we could tell the world a new story.*

68. These words from an officer of Derry City Council reveal a vision of moving forward and developing a new narrative and story for the city. With an increasing number of people in Northern Ireland identifying themselves as Northern Irish or 'Other', the City of Culture initiative is clearly filling demand for a new story or narrative. However, it appeared from the interviews conducted during the course of this research that there are concerns amongst existing cultural leaders and gate-keepers that their rights to cultural heritage and cultural expression are not neglected in the process. The trauma of every post-conflict situation is an inheritance that belongs to the communities involved and the need to express and deal with these traumas, was clearly articulated in these accounts. This clearly is an area where cultural expression has a key role to play. As articulated by the Bogside Artists[143] in relation to their own work and the People's Gallery: 'Whereas our work is saying look we must move on, but to do so we must examine, we have to look, we have to observe and we have to learn. There's nothing frightening in our murals we're simply saying look this happened.'

69. The continued segregation of the two main communities in Northern Ireland, most notably in housing and education, have been noted in particular by international human rights treaty monitoring bodies and there remains a need for greater interaction and sharing of culture not just between the two main communities, but also with the 'other'.[144] For example, the Director of the Peace and Reconciliation Group[145] stated his opinion in relation to the City of Culture initiative: 'I would like to see it be more inclusive, I would

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[142] Although not discussed in depth here, an example referred to in many of our interviews was that of the Sons and Daughters launch concert, which coincided with the protests over the flying of the Union flag referred to earlier and a statement made by one of the artists which it was considered by some to have had the effect of marginalising the Protestant/Unionist community.

[143] The Bogside is a nationalist area of the city. For information about the Bogside Artists and their work, *see* wwww.bogsideartists.com (*accessed* 22 June 2013).

[144] *See* Part IV, Sec. 2 of the full length version of this report.

[145] For further information about the work of the Peace and Reconciliation Group, *see* *http://www.peaceprg.co.uk/* (*accessed* 22 June 2013).

like to see the AOH[146] and the Apprentice Boys coming together.' The representative of the Black and Minority Ethnic communities further substantiates this point: 'what we're looking for is a culture change really …not overnight by any means, but engagement with the "other." And I'm afraid to say it's not happening. It's not happening with the main "other" and it's certainly not happening with the lesser "other."' This final quote reveals a key component in the telling of a new story for the city which, while acknowledging the changing demographics, also recognises the need to continue to address the trauma of the past and to encourage more meaningful engagement and inclusivity between groups. This is to be seen as part of the broader attempt to create more meaningful engagement between groups that holds the potential to lead not only to integration but ultimately to real reconciliation. This is required both to ensure the protection of a group's own culture and to develop knowledge of other cultures, which is necessary both for the development of future cohesion in a post-conflict society and for the realisation of cultural rights in a more meaningful sense. The emphasis on purposeful inquiry in the City of Culture programme therefore would appear to have a particularly important role to play in this regard.

4.7 Conclusion: Looking Beyond 2013

70. This large-scale initiative appears to have had considerable success in ensuring the accessibility and availability of culture for all, although there are concerns about what will happen post-2013 without further central government support, particularly in light of increased expectations from the local population.[147] However, Derry/Londonderry will surely benefit from the investment in the development of cultural excellence and in emerging cultural leaders for some years to come. This report has revealed that cultural identity, heritage and expression, coupled with effective participation processes, are fundamental elements in establishing a symbolic landscape in a post-conflict society that is not only representative of all members of the society, but that also improves it. In the launch of a new cultural platform in any post-conflict society, it is clear that sufficient space needs to be allowed for local culture, which includes competing cultural narratives, to emerge. This is important not only in terms of meeting the developing requirements in relation to cultural rights under international human rights law but also in light of the particular challenges that a post-conflict situation presents for the realisation of such rights. The challenges that have arisen reflect issues of cultural contestation that will inevitably arise or occur in any post-conflict setting and the main challenge would appear to be to manage such contestation in a way that ensures a right to participate in cultural life which encompasses rights to cultural heritage and expression for all individuals and communities.

Postscript

71. The Maiden City Festival, linked to the Apprentice Boys' largest annual parade, was held from 3-10 August 2013,[148] and was followed by the All-Ireland Fleadh, which was held in the city from 11-18 August 2013.[149] Both were supported by the Culture Company as part of the City of Culture initiative, with considerable efforts made to make both events

[146] Ancient Order of Hibernians, an Irish Catholic Fraternal organisation.

[147] One of the concerns expressed by the officer of Derry City Council was that it 'will be a very successful year and the expectation from the community is that they will want to extend this beyond and unless we get the central government support it will be very difficult to sustain a lot of the activity.'

[148] For information on this year's programme, *see* www.maidencityfestival.com/programme/2013-maiden-city-festival-ready-to-go/ (*accessed* 5 August 2013).

[149] For details of the 2013 programe, *see* www.2013fleadh.ie (*accessed* 5 August 2013).

as inclusive as possible.[150] Despite the criticisms and the challenges, including those of a financial nature,[151] it is clear that the City of Culture has provided a unique opportunity for the city and for the showcasing and celebration of local culture, with the creation of new spaces for the sharing of cultural expression and heritage.

V. The Derry/Londonderry Conclusions and Recommendations on Upholding the Human Right to Culture in Post-Conflict Societies

72. The present report was discussed at an expert meeting that took place in Derry/Londonderry, Northern Ireland, on 2-3 July 2013. The participants of the meeting are listed at Annex A. Following the meeting, and taking account of the commentary, the Northern Ireland Human Rights Commission has adopted the report and it puts forward the following conclusion/recommendations. While many of these recommendations have generic significance, they are intended primarily in the context of the honouring of cultural rights in societies emerging from conflict. All of the conclusions and recommendations are predicated on the view that respect for those cultural human rights that are found in the international and regional human rights treaties is integral to the making and consolidation of peace in societies emerging from conflict.

- This inexorable relationship of the respect for cultural rights and of peace needs to be better acknowledged and addressed by all stakeholders in peace-making and peace-building processes, including parties in conflict (both of a State and non-State character), negotiators, specialist UN and regional agencies and relevant civil society actors.
- Respect for cultural human rights should be integrated in peace agreements, related constitutional settlements, such as bills of rights and other related frameworks. Commitments to protect cultural rights should extend to the ratification of relevant regional and international human rights instruments.
- It is important that cultural stakeholders participate in peace negotiations and in peace-implementation and peace-oversight bodies.
- Respect for cultural rights needs to be integrated in all stages of peace-building with recognition that it is necessary for the resolution of concerns regarding peace, security and justice. Promotion of cultural rights and redress of violations of cultural rights should be an important part of any transitional justice programme.
- Actors at the national and international levels with responsibility for upholding human rights need to recognise the importance of championing cultural rights in societies emerging from conflict. Such actors include, at the national level, national human rights institutions and human rights civil society, and, internationally, human rights treaty monitoring bodies, the UN High Commissioner for Human Rights, the United Nations Human Rights Council and its Special Procedures and the UN Peace-building Council.

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[150] For example, a number of bands and Protestant or Unionist organisations participated in the Fleadh with a subcommittee set up specifically focused on engagement of these communities . See UK City of Culture 2013: Derry City Council/Culture Company Briefing to Committee for Social Development (NI), Official Report Hansard 2012/13, Tuesday 06 June 2013 for reflections on this as well as other developments and initiatives at the mid-way point.

[151] *Ibid.*

- The UN Human Rights Treaty Bodies should better integrate post-conflict contexts into their understanding and application of cultural rights. In particular, the Human Rights Committee should update its General Comment 23 of 2004 to better address such contexts, and the Committee on Economic, Social and Cultural Rights should consider the adoption of an annex to General Comment 27 on the application of article 15 of the International Covenant on Economic, Social and Cultural Rights in post-conflict contexts.
- Cultural rights extend to a right of access to and the enjoyment of cultural heritage.
- Cultural rights belong to all persons without discrimination, including to members of non-dominant or otherwise culturally excluded or overlooked communities.
- The upholding of cultural rights will only be meaningful if it integrates close and on-going participation of the holders of human rights and in particular of those individuals and communities whose cultural rights are at most risk. Such participation has value in its own right and not just for purposes of achieving other public purposes.
- Participation, to be meaningful, must ensure the engagement and views of community residents and cultural stakeholders; it must ensure that the voices that are heard are not just those of "cultural gatekeepers" but that they also include emerging cultural leaders.
- It is imperative that participation embrace the involvement and views of children and young people.
- The upholding of cultural rights in complex or divided societies requires that a cultural accommodation framework be put in place that acknowledges the inevitability of cultural contestation, that facilitates cultural exchanges across communities and that supports the simultaneous thriving of diverse and distinct cultures.
- For diverse and distinct cultures to thrive it is necessary that a regulatory framework be put in place that ensures non-discriminatory access to resources.
- The upholding of cultural rights in post-conflict contexts requires adequate funding support that is sufficiently sustained to support meaningful progressive realisation of cultural rights.
- Cultural rights are not absolute rights and the state has the responsibility to regulate cultural expression so that it does not serve to violate the human rights of any person.
- Internationally, there is much good practice regarding the upholding of cultural rights in societies emerging from conflict. It is important that that such good practice be identified and widely disseminated.
- Such designations as a "city of culture", whether at national, regional or international levels, can play an important part on drawing attention to both good practice and the complexity of respecting cultural rights. As happened in the case of Derry/Londonderry, it is very valuable to award such designation to cities emerging from conflict.

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Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Information presented by the Kenyan National Commission for Human Rights*

Note by the Secretariat

The Secretariat of the Human Rights Council hereby transmits the communication submitted by the Kenyan National Commission for Human Rights,** reproduced below in accordance with rule 7(b) of the rules of procedures described in the annex to Council resolution 5/1, according to which participation of national human rights institutions is to be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005.

* National human rights institution with "A"-status accreditation from the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

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Annex

[English only]

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Rights of persons with disabilities to education in Kenya

I. Introduction

1.1 Kenya National Commission on Human Rights

1. The Kenya National Commission on Human Rights (KNCHR) is an independent National Human Rights Institution with 'A status' accreditation. The Commission was originally a statutory body established under the KNCHR Act of 2003. With the promulgation of the 2010 Constitution, the Commission was re-established under Article 59 (4) of the 2010 Constitution and for that reason, enjoys Constitutional protection as a Constitutional Commission.

2. Pursuant to the KNCHR Act (No.14 of 2011), the Commission is mandated to promote the protection and observance of human rights in public and private institutions. In line with the new constitutional dispensation and in keeping with the expansive Bill of Rights which entrenches economic and social rights and explicitly recognizes that every person has the right to education[1] and further recognizes that a person with any disability is entitled to access educational institutions and facilities[2], KNCHR recognizes the realization of economic and social rights as one of its strategic priorities for the period 2013/18.

3. As the National Human Rights Body, KNCHR was appointed by the Attorney General as the independent monitoring body on implementation of the UN Convention on Rights of Persons with Disabilities in line with Article 33 (2) of CRPD[3]. KNCHR undertakes this role through:

- Conducting monitoring visits in various counties to assess the status of rights of PWDs
- Providing advisories to the Government on legislation and policies to ensure rights of PWDs are infused
- Conducting research on issues affecting PWDs, providing appropriate recommendations and disseminating the same to relevant stakeholders
- Networking with Disabled Persons Organizations in promotion and protection of rights of PWDs
- Creating awareness on rights of PWDs
- Receiving and investigating complaints lodged on violations of rights of PWDs

1.2 Statistics on persons with disabilities in Kenya

4. Against a population of over 37 million, there are 7 million PWDs as per the Kenya National Survey for Persons With Disabilities of 2008[4]. The PWDs are disproportionately

[1] The Constitution of Kenya at Article 43(1) (f)

[2] The constitution of Kenya at Article 54(1) (b)

[3] Kenya signed the CRPD IN March 2007, and subsequently ratified it in May 2008

[4] See, Kenya National Survey for Persons With Disabilities, 2008 (National Coordinating Agency for Population and Development *and* Kenya National Bureau of Statistics) available at http://www.afri can.org/CBR%20Information/KNSPWD%20Prelim%20Report%20-%20Revised.pdf . This was the first survey of its kind to be conducted in Kenya. The survey aimed at estimating the number of PWDs, their distribution in the country, and their demographic, socio-economic and socio-cultural characteristics. The survey also sought to determine the types and causes of the disabilities; the problems faced and coping mechanisms, and the nature of services and rehabilitation programmes

represented among the poor and tend to be poorer than their counter parts without disabilities. Results of the survey place the prevalence of disability in Kenya at 4.6%. This is the proportion of the population with the following impairments: physical, mental, visual, speech, self-care and hearing. According to the survey data, the most prevalent type of disability is physical disability, followed by visual impairment. Regionally, the highest disability rates were recorded in Nyanza (6.8%) followed by Coast (5.2%) and Central (5.2%) provinces. The lowest disability rates were found in North Eastern Province (2.6%) followed by Rift Valley (3.2%)

5. About 67% of PWDs had a primary education and 19% attained secondary, a small proportion of PWDs had attained middle level of education, but only 2% had reached university level. Of the PWDs who had attained primary education, big proportions were rural residents (72%), compared with 48.6% in urban areas. In contrast, more PWDs in urban areas had attained higher education. Males are slightly more advantaged than females[5].

6. The results indicate that about 7% reported having been denied enrolment at any level of education. In particular, about 3% had been denied entry to regular pre and primary schools because of their condition such schools. PWDs aged below 25 years had a high proportion of those who were denied entry into regular preschool and primary school compared with those who were older.

7. 39% of the PWDs who left or dropped out of school said they did not have enough money to continue, while 26% had already completed the highest grades at different levels. In urban areas 43% of PWDs had left school because they completed, compared with only 21% of their rural counterparts. Illness and lack of interest (18%) were cited as other reasons for dropping out of school. About 6% had dropped out of school because of their disabilities.

II. Legal and Policy Framework that guides access to Education by Learner with disabilities

8. The Legal and Policy framework that guides Access to Education by learners with disabilities in Kenya include the Constitution of Kenya, Disabilities Act(2003), Basic education Act, Children's Act and the Sexual offences Act, which are currently under review to align them to the Constitution. Other policies include National Strategy for development ,Vision 2010,National Children Policy (2007), National Policy on Special Needs Education of 2007, national policy on special needs education of 2007, The National Policy on Ageing and older persons of 2007,The National Policy on PWDs of 2006.

9. The PWDs Act, 2003 specifies that all learning institutions must take into account the special needs of persons with disabilities with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical education requirements and other similar considerations. The Act also specifies that no person or learning institution shall deny admission to a person with disability because of their disability.

10. Internationally, Kenya is signatory to various human rights instruments which further obligates it to take specific measures to enhance the realization of human rights, the obligations are further amplified by dint of Article 2(5) and 2(6) of the constitution which provides that the general rules of international law shall form part of the law of Kenya and

[5] See, Kenya National Survey for Persons With Disabilities, 2008 , pp 16

that any treaty or convention ratified by Kenya shall form part of the law of Kenya. With this regard, the State has internationally committed itself to protect the rights of person with Convention on the Rights of Persons with Disabilities (CRPD)[6].

III. Access to Education by Learners with Disabilities

11. Governments are obliged to make education available, accessible, acceptable and adaptable[7] for all children. As a state party to the ICESCR and CRC, Kenya is obliged:

"*To take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*"[8]

12. Kenya's obligations respecting the right to education for children with disabilities are exercisable at three levels:

- The obligation to respect the right to education which would, for example, require Kenya to refrain from adopting any measures that would hinder or prevent persons with disabilities from accessing education;
- The obligation to protect which would, for example, require Kenya to ensure that no other actor interferes with the access of education by persons with disabilities; and
- The obligation to fulfil which would, for example, require Kenya to fulfil or provide for the realisation of the right to education for persons with disabilities.

13. In ensuring access to education to all, Kenya launched the free primary education programme in 2002. Despite this programme, 11 years later, persons with disabilities have not been able to access education at equal levels with the able-bodied learners. KNCHR embarked on monitoring the rights of persons with disabilities in various counties countrywide so as to adequately evaluate the status of the rights of Persons With Disabilities (PWDs). Three levels were used to gauge whether the State was respecting its human rights obligations towards PWDs: first, the International Convention on the rights of PWDs; second, the Constitution of Kenya; and finally the Persons With Disabilities Act of 2003. The aim of the exercise was to evaluate whether persons with disabilities were able to enjoy their rights on an equal basis and without discrimination. Among the rights monitored and central to the advancement of PWDs is the right to education. The exercise combined with KNCHR's thematic researches[9] and engagement with stakeholders noted a number of challenges that continues to hinder access to education by learners with disabilities.

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[6] Article 28 of the CRPD

[7] Former United Nations Special Rapporteur on the right to education Katarina Tomasevski stated that the core contents of the right to education entails ;Availability, Access and Non Discrimination, Acceptability and Adaptability see

[8] Committee on Economic, Social and Cultural Rights (1990): *General Comment No. 3 on the Nature of State Parties Obligations*, 5 Session, 1990.

[9] KNCHR conducted a research on access to education by persons with disabilities in Kenya in 2008

3.1 Challenges experienced by Learners with Disabilities

3.1.1 Segregated, integrated and Inclusive education

14. Special Needs Education (SNE) in Kenya is undertaken within segregated, integrated or inclusive education settings. Most of children with disabilities who attend school learn in schools catering for specific categories of disabilities. Schools exclusively for children with visual impairments, hearing impairments, intellectual disabilities and physical disabilities have continued to exist despite pressures from integrated and inclusive education models which are increasingly becoming the norm.

15. Significantly, only a small percentage of children with disabilities attend school at all in view of scarce resources and limited facilities. With regard to inclusive education, nothing much has been achieved besides various policies[10] that note government will be keen on implementation of inclusive education for persons with disabilities.

16. *Sessional Paper No. 1 of 2005*[11] emphasizes inclusive education as one of the key strategies for facilitating access to education for children with disabilities. Similarly, a Task Force on Special Needs Education set up in 2003 recommended inclusive education as a key strategy for expanding access to education for children with disabilities.

17. Inclusive education clearly has benefits especially regarding the social integration of children with disabilities, their development and in removing stigmas associated with disability. However, the government has not done enough to facilitate inclusive education; and the effect has left inclusive education as an impracticable and ill-understood theory[12]

18. One commonly held implication was that inclusive education simply entailed removing children with disabilities from special schools to ordinary schools; when, in fact, inclusive education concerns itself with teaching the disabled child in the environment best suited for learning in view of such child's disability

3.1.2 Curriculum

19. A curriculum is the key document outlining the content of education. Schools catering for children with intellectual disabilities use three kinds of curricula, which contribute to their education. These are:

- Academically oriented curriculum (ordinary school curriculum);
- Social curriculum (focusing on skills of daily living); and
- Vocational training curriculum.

20. At the moment however, there is no uniform curricula applied for teaching children with intellectual disabilities. Since schools do not have curricula specifically designed for learners with intellectual disabilities, the schools use adapted curricula – entailing the use of the regular school curriculum as adapted to suit the circumstances and needs of the learner.

21. Examinations such as Kenya Certificate of Primary Education are particularly daunting and harrowing for pupils with disabilities who would be examined without due regard for reasonable accommodation measures in view of their disabilities.

22. The curricula for social skills education and vocational training are understated and undervalued by the Government hence nationally recognised certificates were not issued to

[10] the national Special needs Education Policy framework of 2009 and the Disability Act of 2003
[11] the *Sessional Paper No. 1 (2005)* on A Policy Framework for Education Training and Research
[12] Objects of pity or Individuals with rights, 2007 Occasional Report by KNCHR

pupils upon qualification. National certificates, would give value (of credibility and legitimacy) to the education or training in question.

23. For learners with autism, psychosocial and intellectual disability; access to education is far from realization. In addition to inadequate learning institutions that can adequately accommodate them, the curriculum that is used in schools has been to their disadvantage as it has not considered the needs of these groups. The main grading system in Kenya is through national examination which may not necessary favour learners with intellectual disability.

24. There is therefore need to Review and adapt where necessary the curriculum, textbooks, examinations and assessment procedures to ensure access and inclusion of all children.

3.1.3 Teaching staff

25. Teaching children with disabilities goes beyond regular school teaching responsibilities to include social work and childcare. SNE teachers bear responsibilities over and above their traditional roles as teachers, including vocational training, post-school follow up and they have to be on call 24 hours should their pupils need help. The only extra allowances teachers in special schools are paid amounted to 10% of the minimum basic salary of the teacher's grade.

26. Teachers especially those in regular schools have no additional training in special needs education. This makes them ill-equipped to provide adequate and quality services to learners with special needs; there is also deficiency in the teacher-student ratio in classes for children with disabilities.

27. Despite the set ratios, the practice on the ground is totally different. In many special schools for children with intellectual disabilities, the student-teacher ratio is 1 teacher for more than 15 students and in some schools; the ratio was as high as 1 teacher for more than 20 students.

3.1.4 Vocational training and employment for persons with disabilities

28. The vocational training is of great relevance to the livelihoods of children with disabilities. Here, we illustrate this point with the situation which children with mental/intellectual disabilities face. Primary School is the highest academic level in these schools after which some children get integrated in regular schools while those who cannot be integrated proceed to pre-vocational and to vocational classes. It is in the vocational class that these learners are taught skills through which they can earn a living - including weaving, tailoring, carpentry and knitting.

29. Therefore, these schools have responsibilities over and above the traditional role of teaching. Teachers have to consciously make assessments of each child's abilities for purposes of eventual onward placement either in academic or vocational classes. Virtually all rehabilitation centres face difficulties raising resources for their upkeep. The Government seemed to make a disadvantageous differentiation in resource allocation against rehabilitation as distinct from traditional education institutions for children with disabilities.

3.1.5 Government funding

30. The first challenge is with regard to adequate learning facilities for PWDs. Kenya lacks adequate learning facilities and learners with disabilities have to wait longer before getting admission due to congestion. In total, there are 3464 special needs institutions with 2713 being integrated institutions and 751 special schools. Out of these only 10 are public

secondary schools for learners with hearing impairment; 3 for learners with physical disabilities and 4 for learners with visual impairment making a total of 17 secondary schools for learners with disabilities in the country. This has adversely affected learners with disabilities accessing higher education[13].

3.1.6 Education Assessment Centres

31. Since the 1980s, the Government has established Educational Assessment and Resource Centres (EARCs) at the district level (with some physical facilities shared by two or more districts). EARCs perform services - including early identification of disability for appropriate intervention, as well as assessment of children with disabilities for referral and placement in appropriate educational programmes. EARCs are, therefore, crucial in ensuring appropriate educational intervention for children with disabilities.

32. The government has for the past 4 years not been funding EARCs which has adversely affected the functioning of the centres. The centres lack proper equipment and adequate personnel with most of the time centres having an individual with one area of specialization risking misidentification.

33. The government should establish and equip more EARCs in every district. Similarly, adequate, trained and multi-disciplinary teams should be provided in all EARCs.

3.1.7 Quality assurance in the provision of special needs education

34. The Ministry of Education requirement is for schools for children with disabilities, and schools generally, to be regularly inspected by the Quality Assurance and Standards Division to ensure the quality of education. However, the study learnt that special schools were not inspected regularly, and that where this was done, the quality assurance officers lacked expertise and did not understand what it is that they were inspecting.

35. Quality Assurance and Standards Officers (QASOs) generally did not understand what special needs education entailed. The EARC in Kisumu[14] reported a case where one officer queried why learners with intellectual disabilities were being taught how to drink water – remarking that this was a waste of time and that the pupils should be 'taught' useful subjects. The officer did not understand that education for a child with an intellectual disability entails much more beyond the academic and that learning how to drink water is an activity of daily living that has to be taught. In Tumutumu School for the Deaf[15], a scenario was described where quality assurance officers avoided inspecting the school, joking, anyway, that the teachers in the school knew what was best and that the officers had so much more work which they understood better. Many inspectors were also not familiar with the conditions of children with disabilities, and in one example, at Ebutsiratsi Special School[16], an officer fled from the class he was inspecting and opted to complete his report in the staff room after witnessing an epileptic child having a fit. When it comes to integration of children with intellectual disabilities to regular schools, this study found that inspectors are not well versed with the concept. At the Kaimosi Special School[17], for instance, the study was informed of a case where an inspector was demanding the

[13] According to the Kenya National Survey for Persons with Disabilities published in May 2008 by the National Coordinating Agency for Population and Development; 67% of persons with disabilities had primary education and 19 % attained secondary education. But only 2% had reached university level

[14] KNCHR monitored various academic institutions and EARCs all over the Country to ascertain the status of rights of Persons with Disabilities when accessing education

[15] Ibid

[16] Ibid

[17] Ibid

integration of a 20 year old student with intellectual disabilities into class 8 of a regular school, yet an assessment done found that the student could only fit in class 5 of a regular school.

36. The situations described here suggested to the study that monitoring the quality of education for children with disabilities is not a high priority in the Ministry of Education. Under these circumstances, issues of monitoring implementation of curricula and even use of facilities and equipment cannot be assured in institutions educating children with disabilities. A pertinent point in this regard is the need for the Quality Assurance and Standards Division to monitor curriculum implementation and the proper utilization of funds under Free Primary Education. It is also necessary that it should ensure that teachers trained by KISE use their learning for the benefit of learners with special needs.

3.1.8 Stigmatization and stereotyping

37. This continues to prevail in some communities and most parents prefer educating the able-bodied over learners with disabilities. Most learners with disabilities therefore end up being illiterate which negatively impacts on their chances of getting employment.

IV. Conclusion

38. Access to education for PWDs is central to the development of any society and it is impossible to divorce the rights of persons with disabilities from the broad developmental agenda. Granted, the Kenyan State has put in place legislation that guarantees their rights but as it has often been the case most people only pay lip service to these laws.

39. Sensitization of communities on the importance and rights of PWDs is an urgent step towards a human rights society; particularly to eliminate prejudice, stereotypes and foster respect for the rights and dignity of PWDs. The State and all other stakeholders should collaborate in dealing with the overarching challenge of resources to fund education.

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Annex

[English only]

Access to justice for children in Kenya

Introduction

1. Kenya National Commission on Human Rights

The Kenya National Commission on Human Rights (KNCHR) is an independent National Human Rights Institution with 'A status' accreditation. The Commission was originally a statutory body established under the KNCHR Act of 2003. With the promulgation of the 2010 Constitution, the Commission was re-established under Article 59 (4) of the 2010 Constitution and for that reason, enjoys Constitutional protection as a Constitutional Commission.

Under its constitutive Act, KNCHR is mandated, among others, to act as the principal organ of the State in protecting and promoting human rights in Kenya.

In line with the new constitutional dispensation and in keeping with the expansive Bill of Rights, KNCHR recognizes institutional reforms and access to justice as two of its strategic priorities for the period 2013 - 2018.

1.2 Overview of Access to Justice in Kenya

Access to justice revolves around the ease with which ordinary citizens are able to make use of the laws, legal procedures and legal institutions to resolve their problems in general and particularly to ensure their rights. Human Rights would be futile without an effective means of seeking redress for their breach. Some of the essential components of access to justice include: laws- that are fair and accessible to the citizens in their form and language, the availability of a variety of easily accessible and effective mechanisms for resolving disputes that are adequately resourced and organised; simple and affordable procedures for achieving justice, fairness in the results of dispute resolution processes and knowledge on the part of citizens to enable them easily use the law and legal institutions.[1]

The Constitution is a significant document with regard to entrenching the right to access to justice for all in Kenya[2]. Internationally the Government has legally committed to ensure access to justice to individuals under:

- The International Covenant on Civil and Political Rights *(Article 14 and 26)*
- The United Nations Convention against Torture *(Article 13 and 14)*
- The International Convention on the Elimination of All Forms of Racial Discrimination (*Article 6*)

[1] The Draft National Policy and Action Plan on Human Rights whose purpose is to give effect to the Bill of Rights contained in the Constitution by providing a comprehensive framework that elaborates broad human rights principles.

[2] See Article 10 , Article 20 (4), Article 22(1) and (3), Article 27 (1), Article 48, Article 50, and Article 159 of the Constitution of Kenya > Available at http://www.kenyalaw.org/kl/index.php?id=398

- Convention on the Rights of Persons with Disabilities (Article 13)
- The African Charter on Human and Peoples' Rights *(Article 7)*
- Maputo Protocol [3](*Article 8 and 15*).

Under the Vision 2030[4], access to justice has been identified as critical component in alleviating poverty as it creates an enabling environment for investment and development. The goal for the 1st and 2nd Medium Term Plans of the Vision 2030 is to develop and implement a legal and institutional framework that is vital to promoting and sustaining fair, affordable, and equitable access to justice.

2.0 Rights of the Child

2.1. Access to justice for children in Kenya

Kenya is a signatory[5] to the Convention on the Rights of the Child and is also a signatory to the African Charter on the Rights and Welfare of the Child[6]. Kenya has domesticated and implemented these international instruments domestically through the Children's Act, 2001[7]. The constitution of Kenya[8]provides that the general rules international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the constitution. The CRC and the ACRWC established the overarching legal framework to consider how countries are giving effect to the rights of children at the domestic level.

The Children's Act (hereinafter "the Act") sets forth legal obligations of all duty bearers - the government, parents, and civil society- to respect, protect and fulfil the rights of children. It has been hailed as a landmark by virtue of the fact that it is the first example of a comprehensive enactment in Kenya which gives effect to any international human rights treaty to which the country is a party.[9] The long title of the Act describes the purpose of the Act as:

'*An Act of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the CRC and the African Charter on the Rights and Welfare of the Child and for connected purposes*'.

The constitution of Kenya[10] provides for a system of court system in Kenya, the constitution in Article 169 provides for the establishment of the subordinate courts[11].

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[3] Also known as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. It guarantees comprehensive rights to women in Africa.

[4] http://www.vision2030.go.ke/

[5] Convention on the rights of the child, Kenya ratified the convention on 31 July 1990

[6] African Charter on the Rights and Welfare of the Child ratified by Kenya on 25 July 2000,

[7] Children's Act No.8 of 2001 (Chapter 586 Laws of Kenya)

[8] Constitution of Kenya 2010 at Article 2(5) and 2(6),Available at http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf

[9] See 2005 'Rights Brought Home?: Human Rights in Kenya's Children Act 2001', Wabwile, MN in Bainhaim, A and Rwezaura, B (eds.) *The International Survey of Family Law 2005 Edition* Bristol: Jordan Publishing, p394 describes the Act as 'historic' and as having 'broken new ground in Kenya's human rights law'

[10] Ibid, see Article 163 to 170

[11] Subordinate courts include Magistrates court, Kadhis court, court martial and any other court as may be established by an Act of parliament, other than the courts established under Article 162.

The Act [12]establishes child-specific (Children's) courts which are conferred with exclusive original jurisdiction to deal with cases involving children (except capital offences and where children are jointly charged with adults to be handled by ordinary trial courts).

Children in Kenya face a number of challenges accessing justice, these challenges include;

a) Representation of children who are in conflict with the law

The International Covenant on Civil and Political Rights[13] ensures the right to a fair trial, which can be said in certain cases to include legal representation. Pursuant to ICCPR[14], in the determination of any criminal charge against him; everyone shall be entitled to.... Be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, assigned to him in any case here the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it. Article 14 ICCPR also guarantees the right to a fair and public hearing.

The African Charter on Human and People's Rights also embodies the right to a fair hearing. It has been recommended by the Committee that States Parties to the African Charter on Human and peoples' rights to create awareness of the accessibility of the recourse procedure to provide the needy with legal aid.

The Act[15]guarantees due-process rights for children alleged of/conflict with the law. These include the child's right to prompt and direct notification of the charges, the right to legal representation provided by the government (if the child is unable to obtain such representation), the right to a prompt determination of the case, the right to free assistance by a court interpreter and the right of appeal against the decision of a lower court. In relation to the right to legal representation it is noteworthy that although the government has published a legal aid bill[16] an institutionalized legal aid scheme, not only for children, but also for the general Kenyan populace is largely non-existent and still ranks low in the Kenyan government's priorities.

To access the rights, children are often required to obtain legal advice. The Children's Act[17] place the Government under an obligation to "take steps with a view to achieving progressively the full realization of the right of the child." In a state where legal aid is not a civil right, where there is no public defender system, it is incumbent that a system be developed that can avail access to legal advice for children.

b) Child friendly courts/spaces

Although there is no international standard explicitly requiring the establishment of a separate set of courts for children, there is nonetheless an implicit presumption that youth offenders should be dealt with differently from adults, in an understanding environment, and in compliance with the current norms regarding the well-being of the child. The four General Principles of the UNCRC[18] should be complied with throughout the juvenile justice system, including during court proceedings.[19] In Kenya children have had to be

[12] Part XIII,of the children's Act
[13] Article 14 of ICCPR
[14] Article 14.3(d) and Article 14 of ICCPR
[15] Section 186 of the children Act
[16] Legal Aid Bill 2012
[17] Section 3 of the children's Act,2001
[18] The four principles are; survival and development; participation; best interest of the child; non-discrimination
[19] https://www.essex.ac.uk/armedcon/story_id/save_jj_modern_concepts.pdf

handled by adult courts which operate as *ad-hoc* children's courts (by the fact that court officers convert them to serve as Children's courts and exclude the general public).[20] *Ad-hoc* courts lack the ambience necessary for a child-friendly environment. The enactment of the Children's Act highlighted the need for child-specific and dedicated courts in line with the ideal in article 40 of the CRC and article 17 of the ACRWC which encourage the development of child specific systems/forums. Since the Children's Act became law; there have been no new physically built Children's courts have been put up. It is significant however that since the enactment of the Act in 2002, the Chief Justice, has invoked the Act as a legal basis to appoint and gazette magistrates across the whole country to serve as Children's courts' magistrates with the mandate and jurisdiction to specifically handle matters related to the enforcement of the Children's Act, including juvenile justice.[21]

c) *Age of Criminal Liability*

The Act does not enact any new rule on the minimum age of criminal responsibility, therefore leaving a low age of eight under the Kenyan Penal Code. The low minimum age of eight falls short of the UN Committee on the Rights of the Child's consistent criticism of countries with a low minimum age. In its Concluding Observations on Kenya's Initial Report which it considered in the year 2001, the Committee expressed 'concern that the minimum age of eight was too low'.[22] It specifically urged Kenya to consider raising this minimum age to a higher age. Since the Act was passed almost a year after the Committee's observations, it would have been expected that the Committee's recommendations would find expression in the provisions of the Act.

d) *Sentencing child offenders*

There is a range of non-custodial community-based sentences that can be applied to children who come into conflict with the law. They include supervision orders (with or without requirements); probation orders; combination orders (combining community service and probation orders); community treatment orders; community service orders, and attendance centre orders.

The Act also enacts an array of measures by which a court may deal with a child upon a finding of guilt. By enacting these options, the Act substantially seeks to comply with relevant international law[23] on juvenile sentencing. The Act provides for alternative sentences for child offenders.[24] A trial court may upon recording a finding of guilt, deal with a child offender by placing him or her in a probation programme, in the care of an adult or charitable institution, committing the child to counselling, an educational institution, vocational training or to community service. The trial court may also have recourse to the options of ordering the discharge of a child (where this is appropriate) or ordering a friendly settlement between the child and victim(s) of the crime or the payment of fines/compensation. Section 190(1) of the Act specifically excludes *imprisonment* as a punishment for children. This absolute prohibition of imprisonment is broader than the CRC, Article 37(1) (a) and the ACRWC, Article 17(2) (a) both of which only prohibit *life imprisonment without the possibility of parole*. This leaves the option of rehabilitation

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[20] See Human Rights Watch (note 52 above) generally. See also, 2003, *Juvenile Justice Journal: After the Promise - A Situational Analysis of Child Rights Protection under the Children's Act*, The CRADLE and Odhiambo, M

[21] See the CRADLE and Odhiambo (note 93 above) and Chambers of Justice (note 21 above), p7

[22] UN Committee on the Rights of the Child *Concluding Observations*: Kenya, CRC/C/15/Add.160 07 November 2001 Para 22

[23] Article 40(3) of the CRC

[24] The children's Act, section 191(1)

schools (for children aged between 10 and 15 years) and borstals (for children aged between 16 and 18 years) but specifies these as a last resort in line with article 37 of the CRC and article 17 of the ACRWC.[25] Further, the Act prohibits the use of both the death penalty and for the first time in Kenyan criminal procedure law, the use of corporal punishment for children[26]

e) Training of Actors in the Juvenile Justice Sector

The successful implementation of children's justice programmes requires co-operation and co-ordination between the various government bodies involved in the criminal justice system and other agencies, institutions and individuals working to help children in conflict with the law. Training programmes are also essential, to ensure that personnel are properly equipped to work with these children. Training is vital to bringing about changes to criminal justice systems. The setting up of a child friendly justice system requires that personnel working within the justice system be knowledgeable about international standards and guidelines and about how these international standards are to be applied locally. They need to know their own national policies and how to put these into practice. A juvenile justice system will function better if all parties concerned gather together, interact

and exchange ideas on the possibilities and constraints (legal or material) of their role in the administration of juvenile justice. Relevant children's justice personnel should also be trained within each of their roles to better work with children in conflict with the law. A juvenile justice system will function better if all parties concerned gather together, interact and exchange ideas on the possibilities and constraints (legal or material) of their role in the administration of juvenile justice. Relevant children's justice personnel should also be trained within each of their roles to better work with children in conflict with the law.

f) Lack of social protection

The realisation of children's rights has a direct relationship with widespread and endemic poverty levels that exist in Kenya; poverty alone accounts for many of the problems faced by children in Africa.

The legal framework under Kenyan Children's Act affirms the parental duty of support where parents bear the primary obligation to provide for children's needs including education, health, housing, clothing etc., while the State's role is envisaged as secondary and predicated on the inability or unwillingness of parents to take care of their children due to poverty or indigence.

The Act does not provide for mechanisms for securing financial support from public funds [which is] necessary for the survival and development of children in financially disadvantaged family situations.

[25] Article 37 of the CRC and Article 37 of the ACRWC provides that for children 'deprivation of liberty' should only be resorted to 'as a last resort and for the shortest appropriate period of time'. The UN Rules on Juveniles Deprived of their Liberty (Rule 11(b)) broadly defines the term 'deprivation of liberty' to include all instances of confinement whether in closed institutions such as prisons or open child-specific institutions such as reform/rehabilitation schools and borstals which exists in Kenya

[26] sections 190(2) and 191(2).

g) *Establishment of institutional framework for the implementation of children's rights*

The Council of children services[27] remains far from effective in discharging its role in the implementation of children's rights in Kenya and therefore there is need for it to be made effective and efficient and could play a role in terms of the states under the CRC and the ACRWC.

Conclusion

Ultimately, the full realisation of the rights guaranteed under the Children's Act, CRC and ACRWC requires extra-legal measures. This involves four key areas; (a) sensitisation of professionals and the general public, (b) training of professionals, (c) budgeting for children's rights at all levels of government (national, regional and local) and (d) procedural reform within state institutions requiring innovation and dedication of different officials in the implementation process.

Unless something is done to introduce a national regime of state-funded child support benefits, the rights of the child will remain paper rights and pipe dreams for the hundreds of thousands of poor children in Kenya who are ravaged daily by hunger, malnutrition, curable diseases, and material deprivation due to the grinding poverty situation in the country.

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[27] NCCS has the mandate to formulate policies, develop plans, monitor, co-ordinate and mobilize resources for the implementation, realization and safeguarding of the rights and welfare of the Child. Vision To be a vibrant agency in the realization and protection of the rights and welfare of Children for National Prosperity> available on http://www.nccs.go.ke/index.php?option=com_content&view=article&id=59&Itemid=62

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Information presented by the National Human Rights Council of Morocco*.

Note by the Secretariat

The Secretariat of the Human Rights Council hereby transmits the communication submitted by the National Human Rights Council of Morocco,** reproduced below in accordance with rule 7(b) of the rules of procedures described in the annex to Council resolution 5/1, according to which participation of national human rights institutions is to be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005.

* National human rights institution with "A"-status accreditation from the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

** Reproduced in the annex as received, in the language of submission only.

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Annex

[English only]

Information presented by the National Human Rights Council of Morocco concerning Children in Protection Centres: Childhood at risk for an integrated policy to protect children's rights.

In fulfillment of its mandate and prerogatives, the National Human Rights Council *(Conseil national des droits de l'Homme - CNDH)* has analyzed, on its own initiative, the situation of children held by virtue of a court order in child protection centers and the protection of their rights. The objective of this analysis is to assess to what extent the conditions in these centers comply with the standards of the international Convention on the Rights of the Child (CRC).

Fruit of this analysis, CNDH's thematic report was drafted in follow-up to the implementation of the relevant national and international recommendations and observations and in line with a national context characterized by numerous reforms designed to guarantee the promotion and protection of human rights in general and children's rights in particular.

To prepare this report, the Council adopted a participatory approach with all State actors concerned (at central and local levels) as well as associations, children and families, taking into account the gender dimension. One of the main steps of this study was a field survey which included the visit of 17 child protection centers.

Child protection centers are socio-educational institutions affiliated to the Ministry of Youth and Sports. Children in conflict with the law and children in difficult circumstances are institutionalized in these centers by virtue of a court ruling. These centers are mandated to ensure the rehabilitation and reintegration of children. They are composed of three sections (observation sections, rehabilitation sections, and social welfare homes). In total, there are twenty child protection centers (national and regional centers and social welfare homes), three of which are currently closed for renovations. Their total accommodation capacity is 1852 (1252 boys and 600 girls), but their occupancy rate fluctuates strongly and their geographical distribution is uneven.

In addition to child protection centers, there are open custody institutions of two kinds: the probation system and the monitoring system.

The report outlines the international normative framework related to the institutionalization of children, particularly the CRC that Morocco ratified in 1993 and other relevant instruments related to the protection of the rights of children in contact with the law. It also highlights General Comment No. 10 of the Committee on the Rights of the Child which requires States parties to develop and implement a comprehensive juvenile justice policy based on the application of general principles and the provisions of the CRC. This policy should include the prevention of juvenile delinquency, the introduction of alternative measures allowing for responses to juvenile delinquency without resorting to judicial procedures, etc.

Second, based on the analysis of the national normative framework, the report stresses that national laws on juvenile justice are in conformity with the provisions of the CRC

thanks to the various legislative reforms undertaken, in particular the amendment of the Criminal Procedure Code and the Criminal Code.

Indeed, these legislative reforms are a genuine innovation in the protection of children in difficult circumstances. Judges could, in the past, intervene only when the child was either the victim of a felony or a misdemeanor or the perpetrator of an offence. Now the court can intervene earlier, when the child is in danger, giving priority to keeping the child with the parents, guardian, dative tutor, the person taking care of him or responsible for his care or any trustworthy person. If need be, the court can order to place the child in a state institution or in a capacitated non-profit association.

As is the case in the area of juvenile penal justice, these reforms have allowed substantial achievements in protecting the best interests of the child, in perfect harmony with the measures and safeguards set out in Article 40.2 of the CRC, mainly by raising the age of criminal responsibility to eighteen, providing for enforcement judge for juveniles, replacing police custody by the institutionalization of minors, providing for legal assistance, putting in place the probation system and reducing the length of custodial sentences applicable to minors. Moreover, the CRC contains specific provisions for children in conflict with the law aiming at adapting justice to this particular population.

However, there are many shortcomings relating to **the effective enforcement of legislation** due to the lack of resources, capacity and control, frequently leading to child institutionalization. This institutionalization is often unjustified, and sometimes against the best interests of the child. In addition, the terms of child participation in judicial proceedings do not fully comply with the international juvenile justice standards, particularly as regards the right to be heard and to be represented by a well-trained lawyer.

At the institutional level, although the Ministry of Youth and Sports is the ministry in charge of child protection centers, the Ministry of Justice and Liberties plays a role of paramount importance in the judicial protection of children in contact with the law and the decision of their institutionalization. It should be noted that other government departments are also involved, through their prerogatives, in the protection of children in difficult circumstances, particularly the Ministry of Solidarity, Women, Family and Social Development, the Ministry of Health, the Ministry of Education, the Ministry of Vocational Training, and the National Mutual Aid Department (*Entraide Nationale*).

The lack of a comprehensive policy for minors, the weak institutional capacity, the unclear roles and responsibilities as well as the inadequate coordination between the different departments do not contribute to providing appropriate protection and care consistent with laws and the rights of the child.

Civil society is also a major player in the protection and care of children in contact with the law. However, while its contribution is significant in this regard, it faces many challenges, especially in terms of necessary and sustainable human and material resources. Also, partnerships between state bodies and associations are not always properly established (unclear identification of the role of each one of them, of the actions and the means that each should assume the lack of monitoring and assessment procedures and the absence of penalties for breaches).

The analysis of the situation of institutionalized children, based on the results of visits and interviews conducted by the CNDH from November 15 to 29, 2012, highlights the following findings:

- The use of institutionalization and deprivation of liberty is often the first resort ;
- The centers are home to children whose profiles, ages and situations vary markedly. Children in difficult circumstances (children removed from their adverse family environment, abandoned children and rootless or children begging in the streets) are

held in a closed institution, deprived of their liberty and sharing the same facilities with children in conflict with the law who are awaiting trial or serving a sentence. This does not allow an appropriate and adapted care for children, and raises the problem of security and protection of vulnerable children, especially those aged under 12 and children with disabilities;

- There are significant differences in terms of occupancy rate in the Child protection centers; some have a very low occupancy rate while others are overcrowded. This is particularly the case of girls shelters whose number hardly amounts to five;
- Some children are institutionalized in centers located away from their place of residence and therefore from their families because of the geographical distribution of centers and the institutionalization of children according to the availability of places. In addition, some centers are very far away from court district. This poses difficulties for judicial monitoring, family inquiries and the maintenance of family ties;
- The centers are not governed by standards consistent with international norms required for the reception and care of children (physical and material standards, child/staff ratio, supervision quality, child safety and protection, program quality and complaint mechanisms in case of abuse or ill-treatment). The centers are not subject to regular supervision and monitoring by the authority in charge;
- Overall, the living conditions (housing, health and food) do not guarantee the fundamental rights of institutionalized children;
- The rights of institutionalized children are not fully guaranteed, especially the rights to health, physical integrity, protection against all forms of violence, abuse and exploitation, appropriate rehabilitation and participation. The same applies to the right to be heard, protected and legally assisted throughout the judicial proceedings. The right of children to have access to their families is also not fully guaranteed as families are not adequately involved and family ties are not strengthened;
- A large number of institutionalized children are victim of corporal punishment, bullying and verbal abuse;
- Children's right to access to independent complaint mechanisms, to ensure their protection, is not guaranteed;
- Some children spend more than three months in the observation section without being brought before a judge;
- Children running away reflects their discomfort and the inadequate support provided to some of them, in particular those with behavioral disorders and addictions who should benefit from a specific treatment;
- The post-center monitoring of children in open custody is not functional, which greatly affects their right to social reintegration.
- The causal analysis of child institutionalization reveals that institutionalization has many reasons that should be known in order to implement appropriate preventive measures. The absence of a protective family environment, drug addiction and juvenile delinquency are often the causes of institutionalization, especially with the lack of alternatives:
- Due to the lack of a family policy (psychosocial, socioeconomic and parenting) and alternatives to institutionalization (difficult access to the Kafala and the lack of mechanisms regulating the host families), children without adequate family environment are held in child protection centres;
- Drug addict children are treated as delinquents and are held in institutions that are not equipped for their situation and care;

- The deprivation of liberty, even for children who have committed minor offenses, is used as a first resort due to the absence of alternative measures and delinquency prevention programs.

In conclusion, the findings of CNDH's visits to the child protection centers show that **the institutionalization of children in these centers is not compliant with the norms and standards of the UN Convention on the Rights of the Child**. Noncompliance with the provisions of the Convention is obvious in all stages of the institutionalization process.

In order to bring the institutionalization of children in line with the principles and provisions of the CRC, the National Human Rights Council makes several recommendations:

1. Recommendations to the Government

1.1. In terms of the public policy

Adopt a national policy for a comprehensive protection of children, based on the application of the CRC's general principles and provisions. This national policy should include: a child-friendly justice; comprehensive care and follow-up programs easily accessible to children in contact with the law, be they victims, witnesses, offenders or in difficult circumstances; family and parenting support programs; prevention; alternative measures to deprivation of liberty; and alternatives to institutionalization. This policy should provide for the necessary human and material resources, and be subject to monitoring and evaluation mechanisms and accountability arrangements;

Clearly identify the authority responsible for the coordination of the implementation and monitoring of the national policy for the comprehensive protection of children;

Clarify the roles and responsibilities of key ministries and departments concerned, particularly the Ministry of Justice and Liberties, the Ministry of Youth and Sports, the Ministry of Solidarity, Women, Family and Social Development, and the National Mutual Aid Department.

1.2. In terms of training and capacity building

Adopt a training strategy (for initial and continuing training) for the different stakeholders concerned with children in contact with the law: police and gendarmerie officers, judges, public prosecutors, investigating judges, centers' educating teams and directors, social assistants/family investigators, lawyers.

2. Recommendations to the Ministry of Justice and Liberties

Use the deprivation of liberty only as a last resort;

Prefer open custody to the institutionalization of children in difficult situation;

Provide for the human and material resources necessary for the effective enforcement of laws and judicial procedures in order to guarantee for children the right to be informed and heard, the right to adequate legal assistance and the right to protection and proper and quality care ;

Ensure systematic monitoring and assessment of law enforcement.

3. Recommendations to the Ministry of Youth and Sport (in terms of childcare facilities)

Establish standards consistent with the requirements of children's rights;

Develop and implement mechanisms and arrangements for the supervision/control of these institutions, in order to assess their compliance with the established standards, including dignity, participation, protection and development, all standards that contribute to ensuring the best interests of the child ;

Put in place a centralized and reliable information system to monitor the numbers and the situation of institutionalized children.

4. A recommendation to provide a grievance redress mechanisms for children

In order to protect children against all forms of violence, ill-treatment, abuse or exploitation, it is necessary to provide for and have a grievance redress mechanisms for children that should be independent and easily accessible to all children without any discrimination and guarantee the protection and best interests of the child.

5. Urgent recommendations

Considering the worrying situation of a large number of institutionalized children, pending the implementation of the recommendations raised herein, the National Human Rights Council recommends the relevant bodies in charge, affiliated to the Ministry of Justice and Liberties and the Ministry of Youth and Sports, to promptly conduct an assessment of the current situation of institutionalized children in order to:

Review the judicial measures, regardless of their nature, in order to give children the guarantees provided for in the law;

Assess the health situation of children and provide them with the necessary medical care;

Promptly undertake the pending family investigations in order to allow judges to review the institutionalization decision of some children and reintegrate them with their families whenever possible, taking into account the best interest of the child.